Supreme Court, U.S.
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No. 09-091142

In The

Supreme Court of the United States

FIA CARD SERVICES, N.A., PETITIONER,

v.

JOHN C. GORMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 1681s-2(b) of the Fair Credit Reporting Act ("FCRA") makes unlawful a furnisher's failure to echo back to the consumer reporting agencies ("CRAs") a consumer dispute of which the CRA advised the furnisher, when the obligation to notify CRAs of disputes is expressly found Section 1681s-2(a) of FCRA, 15 U.S.C. § 1681s-2(a), and FCRA's private rights of action are available to enforce violations of Section 1681s-2(b) but not Section 1681s-2(a).

2. Whether, as every court before the Ninth Circuit decision below had concluded, Section 1681t of FCRA, 15 U.S.C. § 1681t, preempts a California statute that creates a private damages remedy for violations of state law with respect to the obligations of furnishers of information to CRAs.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption. Petitioner FIA Card Services, N.A. is formerly known as MBNA America Bank, N.A.

CORPORATE DISCLOSURE STATEMENT

FIA Card Services, N.A. is a wholly owned subsidiary of NB Holdings Corporation, which is a wholly owned subsidiary of Bank of America Corporation, which is publicly traded. No publicly traded corporation owns ten percent or more of the stock of Bank of America Corporation.

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PETITION FOR A WRIT OF CERTIORARI

FIA Card Services, N.A. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original opinion of the Ninth Circuit is reported at 552 F.3d 1008. The amended opinion of the Ninth Circuit and the order denying rehearing and rehearing en banc (App., *infra*, 1a-60a) are reported at 584 F.3d 1147. The opinion and order of the district court granting petitioner's motion for summary judgment (App., *infra*, 62a-85a) is reported at 435 F. Supp. 2d 1004. The opinion and order of the district court granting petitioner's motion to dismiss (App., *infra*, 86a-101a) is reported at 370 F. Supp. 2d 1005.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its original opinion on January 12, 2009. Petitioner timely filed a petition for rehearing and rehearing en banc. The Ninth Circuit issued its amended opinion and denied rehearing on October 21, 2009. On January 12, 2010, Justice Kennedy granted an extension of time within which to file a petition for a writ of certiorari to and including February 18, 2010, and on February 10, 2010, he granted a further extension of time to and including March 15, 2010.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant provisions of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, and of the California Consumer Credit Reporting Agencies Act, California Civil Code §§ 1785.1-1785.36, are set forth at App., *infra*, 102a-134a.

INTRODUCTION

The vitality of our Nation's economy depends heavily on the banking and lending system and, even more specifically, the ample availability of credit for consumers and small businesses. Lenders, in deciding whether to extend credit, rely on information compiled by the three major consumer reporting agencies ("CRAs"). That information is provided by 30,000 "furnishers" of consumer credit information in the United States—such as banks and other lenders,

landlords, telecommunications providers, debt collectors, and public utilities. Those furnishers, however, provide consumer information to the CRAs on a purely voluntary basis.

Congress amended the Fair Credit Reporting Act ("FCRA") in 1996 to regulate furnishers for the first time and to impose a uniform, nationwide standard on furnishers who choose to provide information. In enacting these provisions, Congress struck a careful balance between imposing obligations on furnishers and providing enforcement mechanisms, recognizing that overly burdening furnishers with potential litigation and damages would deter them from continuing to voluntarily provide consumer information to the Nation's credit reporting system.

Congress thus imposed accuracy requirements on furnishers that could be enforced by state and federal officials, but provided that furnishers could not be held civilly liable by private parties for damages for such inaccuracies alone. Instead, a consumer who is dissatisfied with information that has been furnished must rely on FCRA's procedural remedies, whereby the consumer first lodges a dispute with a CRA, which then notifies the furnisher about that dispute. The CRA's notification to a furnisher triggers that furnisher's obligation to investigate the dispute and report the results back to the CRA. A furnisher may be held liable in a private enforcement action *only* for failing to conduct a reasonable investigation and to report the results to the CRA; it is not liable in a

private suit for an inaccurate result so long as its investigation was reasonable.

The Ninth Circuit's decision in this case upsets that carefully balanced remedial scheme by erroneously expanding the potential liability of voluntary furnishers in two ways, both of which are inconsistent with the text and purposes of FCRA.

First, the Ninth Circuit announced a FCRA obligation found nowhere in its text and afforded consumers a cause of action to seek damages for violations of that extra-textual obligation even when the furnisher conducted a reasonable investigation. The court held that a furnisher must, in reporting the results of its investigation of a dispute referred to it by a CRA, echo back to the CRA that the furnished information was disputed—even though the CRA already knows of the dispute and was in fact the entity that informed the furnisher of the dispute. This holding not only defies logic, it is unsupported by the text of FCRA and establishes a substantive standard that has been expressly rejected by the Federal Trade Commission and five federal bank regulators that promulgated regulations under FCRA. The court also held that a consumer can enforce the supposed obligation in a federal damages action, despite the fact that the new obligation is not predicated on the statutory obligations on which Congress has afforded consumers the right to sue.

Second, the Ninth Circuit allowed consumers to avoid FCRA's limitations by bringing private

damages actions under California state law against furnishers for providing inaccurate information, instead of having to lodge a dispute with a CRA, as FCRA requires. Before the decision below, every other court that had addressed the issue had held that FCRA preempted the California private right of action for damages.

If left unreviewed, the Ninth Circuit's rulings in this case will exact enormous costs on the credit reporting industry and require significant changes to the automated systems that process more than 1.5 billion credit reports annually on 200 million consumers in the United States. The decisions will also discourage furnishers from continuing to provide consumer information to the CRAs—exactly the *opposite* result Congress intended when it amended FCRA. And that will result in the degradation of the accuracy and integrity of credit reports which are essential to our Nation's economy, and in turn reduce the willingness of lenders to grant credit to worthy consumers.

To protect the efficient functioning of the national credit reporting system, which is crucial to both businesses and consumers, this Court should grant review to reverse the judgment of the Ninth Circuit.

STATEMENT OF THE CASE

A. Statutory Framework

As originally enacted in 1970, FCRA did not regulate individuals and businesses, such as banks,

other lenders, landlords, and utilities that furnished consumer information to CRAs. Instead, FCRA regulated the CRAs—which now include the three major national CRAs: Equifax, Experian, and TransUnion—and those who used the credit reports issued by the CRAs.

At that time, any regulation of furnishers that did exist was done by the States. As the States adopted differing substantive and remedial schemes, this patchwork of regulation did not strike the correct balance in addressing two competing interests. On the one hand, consumers needed protection from inaccurate information about them being furnished to the CRAs. On the other hand, the risk of litigation and damages liability for furnishers would reduce the furnishing of accurate information to CRAs and, in turn, reduce the completeness of credit reports on which those extending credit rely. This is because furnishing of information to CRAs is voluntary; banks, landlords, lenders, and other businesses with abundant consumer information are not legally required to furnish any such information to the CRAs.

To balance these concerns at the national level, Congress enacted the Consumer Credit Reporting Reform Act of 1996 ("CCRRA"), Pub. L. No. 104-208, 110 Stat. 3009, which established federal obligations for anyone who chose to furnish information to a CRA. The CCRRA amended FCRA by, *inter alia*, adding Section 1681s-2 to create a uniform nationwide standard for furnishers' responsibilities with

regard to the quality and accuracy of consumer information provided to CRAs. Congress subsequently amended these provisions in the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), Pub. L. No. 108-159, 117 Stat. 1952.

The carefully balanced statutory scheme includes four key components with regard to furnishers: (1) duties regarding the accuracy of information furnished, (2) duties to investigate consumer disputes, (3) means for enforcing these duties, including limited liability through private litigation, and (4) broad preemption of state laws regulating furnishers.

1. *Accuracy duties: Section 1681s-2(a).* Section 1681s-2(a) governs the content of the information provided by furnishers. It provides, *inter alia*, that "[a] person shall not furnish any information relating to a consumer to any [CRA] if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A).[1]

Section 1681s-2(a) also requires that when a consumer disputes directly with the furnisher "the completeness or accuracy of any information furnished" by the furnisher to a CRA, the furnisher "may not furnish the information to any [CRA] without

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[1] When originally enacted in 1996, Section 1681s-2(a)(1)(A) of FCRA prohibited the furnishing of information if the furnisher "knows or consciously avoids knowing that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A) (1996). The current language was enacted in the FACT Act.

notice that such information is disputed by the consumer." *Id.* § 1681s-2(a)(3).

2. *Investigatory and reporting duties: Section 1681s-2(b).* Section 1681s-2(b) governs the procedures a furnisher must follow when it is notified by a CRA about a consumer disputing the information the furnisher previously provided. If a CRA notifies the furnisher that a consumer has disputed "the completeness or accuracy of any information" furnished, the furnisher must, *inter alia*, "conduct an investigation with regard to the disputed information" and "report the results of the investigation to the [CRA]." *Id.* § 1681s-2(b)(1)(A), (C). Additionally, if "the investigation finds that the information is incomplete or inaccurate," the furnisher must "report those results to all other [CRAs] to which the [furnisher] furnished the information." *Id.* § 1681s-2(b)(1)(D).[2]

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[2] Furnishers will soon have a separate duty under FCRA to investigate when a consumer lodges a dispute directly with the furnisher rather than with a CRA. Section 1681s-2(a)(8) of FCRA, as amended by the FACT Act, requires certain federal agencies to promulgate joint regulations concerning the responsibility of furnishers to conduct such investigations. Those agencies have now done so, and their regulations will take effect on July 1, 2010. *See Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, 74 Fed. Reg. 31,484 (July 1, 2009). Because these obligations are imposed under Section 1681s-2(a) of FCRA, they will not be enforceable through private litigation. *See* 15 U.S.C. § 1681s-2(c)(1).

3. *Enforcement mechanisms: Section 1681s-2(c) & (d).* Sections 1681s-2(c) and (d) govern the availability of FCRA's private rights of action for violations of Section 1681s-2(a) and (b). The effect of Section 1681s-2(c) and (d) is to create a remedial scheme under which a consumer may not bring suit against a furnisher for providing inaccurate information to a CRA, but must instead dispute the allegedly inaccurate information with the CRA and give the furnisher an opportunity to investigate and correct it. Only if a furnisher violates its investigatory and reporting duties that are triggered by the CRA's notifying the furnisher of the consumer dispute may the consumer resort to bringing suit against the furnisher.

Specifically, although consumers may generally bring a private right of action under Sections 1681n and 1681o of FCRA for willful or negligent violations of FCRA, those private rights of action "do not apply to any violation of [Section 1681s-2(a)], including any regulations issued thereunder." 15 U.S.C. § 1681s-2(c)(1). Instead, Section 1681s-2(a) is enforceable "exclusively * * * by the Federal agencies and officials and the State officials identified in [Section 1681s of FCRA]." *Id.* § 1681s-2(d).

By contrast, FCRA's private rights of action are available for a furnisher's willful or negligent failure, after being notified by a CRA of a consumer dispute, to investigate and report the results of the investigation in accordance with Section 1681s-2(b). *See id.* § 1681s-2(c); *see also id.* §§ 1681n, 1681o. For negligent violations, FCRA imposes liability for actual

damages and attorney's fees. *See id.* § 1681o. And for willful violations, FCRA authorizes statutory damages and punitive damages as well. *See id.* § 1681n.

4. *Preemption: Section 1681t.* Finally, Section 1681t of FCRA broadly preempts state laws that regulate furnishers. First, Section 1681t(a) is a general conflict preemption provision that preempts the "laws of any State with respect to the * * * distribution * * * of any information on consumers * * * to the extent that those laws are inconsistent with any provision of [FCRA]" but "only to the extent of the inconsistency." *Id.* § 1681t(a).

Second, Section 1681t(b) specifically preempts state laws related to particular subject matters, including state laws that regulate furnishers. Section 1681t(b)(1)(F) preempts any state "requirement or prohibition * * * with respect to any subject matter regulated under * * * section 1681s-2 of [FCRA], relating to the responsibilities of persons who furnish information to [CRAs]." *Id.* § 1681t(b)(1)(F).

Congress carved out two narrow exceptions to that express preemption provision, specifically saving only two provisions of state law: Section 1785.25(a) of the California Civil Code and Chapter 93, Section 54A(a) of the Massachusetts Annotated General Laws. *Id.* § 1681t(b)(1)(F)(i), (ii). California Civil Code Section 1785.25(a) prohibits furnishers from furnishing information to a CRA if the furnisher "knows or should know the information is incomplete or inaccurate." Cal. Civ. Code § 1785.25(a). And

Chapter 93, Section 54A(a) of the Massachusetts Annotated General Laws proscribes furnishing information if the furnisher "knows or has reasonable cause to believe such information is not accurate or complete." Mass. Gen. Laws Ann. ch. 93, § 54A(a).

Section 1681t(b)(1)(F) of FCRA does not, however, expressly save from preemption California Civil Code Sections 1785.25(g) and 1785.31. Section 1785.25(g) provides that a furnisher "is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that * * * the furnisher maintained reasonable procedures to comply with those provisions." Cal. Civ. Code § 1785.25(g). For negligent violations, Section 1785.31 imposes liability for "actual damages, including court costs, loss of wages, attorney's fees and, when applicable, pain and suffering." *Id.* § 1785.31(a)(1). And for willful violations, Section 1785.31 imposes liability for such actual damages plus punitive damages of at least $100 and up to $5000 for each violation. *Id.* § 1785.31(a)(2).

Nor does Section 1681t(b)(1)(F) of FCRA expressly save from preemption the very similar Massachusetts private right of action. Chapter 93, section 54A(g) of the Massachusetts Annotated General Laws provides that "[a] person who furnishes information to a [CRA] shall be liable for failure to comply with the provisions of this section, unless the person so furnishing establishes by a preponderance of the evidence that * * * such person maintained reasonable procedures to comply with such provisions." Mass.

Gen. Laws Ann. ch. 93, § 54A(g). For negligent violations, section 64 imposes liability for actual damages, litigation costs, and attorney's fees. *Id.* § 64. And for willful violations, section 63 adds liability for "such amount of punitive damages as the court may allow." *Id.* § 63(2).

B. Factual Background

Respondent John C. Gorman purchased from Four Peaks Home Entertainment ("Four Peaks") a satellite television system using his Visa credit card issued by FIA Card Services, N.A.'s ("FIA's") predecessor, MBNA America Bank, N.A. ("MBNA"). App., *infra*, 3a. According to Gorman, the satellite system that Four Peaks delivered and installed was defective, and Gorman's roof was damaged in the installation. App., *infra*, 3a, 63a.

Gorman wrote MBNA and disputed the entirety of the Four Peaks charges, which totaled $759.70. App., *infra*, 3a-4a. MBNA responded by requesting additional information about the dispute, including proof that the goods for which Gorman sought a credit had been returned to the merchant. Over a period of four months, MBNA repeatedly asked Gorman to provide additional information about his dispute, but Gorman refused to do so and instead referred MBNA back to his original letter. App., *infra*, 4a-5a.

Attempting to resolve the dispute, MBNA contacted Four Peaks, which told MBNA that it had shipped replacement equipment to Gorman but that Gorman had still not returned the original goods.

Four Peaks also stated that it would not refund Gorman's purchase unless the goods were returned. MBNA contacted Gorman, who told MBNA that he still had possession of the original goods and would never return them. Gorman also informed MBNA that he would make no more payments on his MBNA account—the balance of which exceeded $6,000—even for non-disputed purchases. App., *infra*, 5a-6a.

After Gorman in fact did stop making payments on his account and it fell into severe delinquency, MBNA reported Gorman's account as "charged-off" to all three of the largest national CRAs—Equifax, TransUnion, and Experian. Gorman contacted all three CRAs and disputed the accuracy of the charge-off notation in his credit file. As required by FCRA, 15 U.S.C. § 1681i(a)(2), the CRAs notified MBNA of Gorman's disputes. MBNA investigated the disputes and reported to the CRAs that the information MBNA had furnished—that Gorman's account was charged-off—was accurate. App., *infra*, 7a. According to Gorman, when MBNA reported the results of its investigation to the CRAs, MBNA did not also report that Gorman continued to dispute a portion (but not all) of his account balance—the charges for the satellite television system. App., *infra*, 7a.

C. Proceedings Below

1. Gorman sued MBNA in the United States District Court for the Northern District of California. As relevant here, Gorman's amended complaint brought claims against MBNA under FCRA's private

right of action and California Civil Code Sections 1785.25(g) and 1785.31. App., *infra*, 8a.

The district court dismissed Gorman's state-law claim, holding that it was preempted under Section 1681t(b)(1)(F) of FCRA. The district court, in agreement with every state and federal court that had ruled at that time, stated that "[w]hen Congress enacted FCRA, it expressly saved California Civil Code 1785.25(a) from preemption by carving out an exception for that subsection in the preemption provision, but it did not similarly save § 1785.25(g) or § 1785.31." App., *infra*, 95a. "Without the benefit of those sections, Gorman has no private right of action to bring suit for a violation of § 1785.25(a)." App., *infra*, 96a. Instead, "the proper parties to pursue such liability" for violating California Civil Code Section 1785.25(a) "are Federal and State officials." App., *infra*, 96a.

The district court also dismissed Gorman's FCRA claim, which alleged that MBNA failed to report to the CRAs the existence of a dispute concerning his delinquent account. App., *infra*, 96a-98a. The court ruled that to the extent such conduct would violate Section 1681s-2(a) of FCRA, it is not actionable under FCRA's private right of action. App., *infra*, 98a. And even if such conduct could violate Section 1681s-2(b) of FCRA, the court held that Gorman had not pleaded sufficient facts to state a claim. App., *infra*, 98a. Accordingly, the district court dismissed the FCRA claim but granted Gorman an opportunity to replead

a claim that would be based solely on an alleged Section 1681s-2(b) violation. App., *infra*, 98a.

Gorman then filed an amended complaint that included a FCRA claim based on two allegations: (1) again, that MBNA did not mark his delinquency as "disputed" when MBNA reported the results of its investigation to the CRAs and (2) that MBNA did not conduct a reasonable investigation after the CRAs notified it of the dispute. App., *infra*, 70a.

The district court entered summary judgment in favor of MBNA. With regard to Gorman's claim that MBNA did not mark the reported information as "disputed," the district court held that his allegations stated a violation of Section 1681s-2(a) of FCRA only, but "such a violation of § 1681s-2(a) is not before this Court" because it is not privately enforceable. App., *infra*, 70a. With respect to the reasonableness of MBNA's investigation under Section 1681s-2(b) of FCRA, the district court ruled that Gorman had failed to demonstrate a genuine issue of material fact that the investigation was unreasonable. App., *infra*, 69a-71a.

2. The Ninth Circuit affirmed in part and reversed in part. App., *infra*, 1a-60a.

The Ninth Circuit, in admitted disagreement with every other court to address the issue at that point, held that Gorman's California Civil Code Section 1785.31 claim for a violation of California Civil Code Section 1785.25(a) was not preempted. App., *infra*, 51a-59a. Relying on *Riegel v. Medtronic,*

Inc., 552 U.S. 312 (2008), the Ninth Circuit concluded that California Civil Code Section 1785.31's right of action for damages does not impose a "requirement or prohibition" and thus is not expressly preempted by Section 1681t(b)(1)(F). App., *infra*, 52a-53a.

The court of appeals upheld the grant of summary judgment for MBNA on Gorman's FCRA claim under Section 1681s-2(b) regarding the reasonableness of MBNA's investigation in response to the notice from the CRA of Gorman's dispute. App., *infra*, 52a-53a.

With regard to Gorman's private right of action under FCRA for MBNA's alleged failure to notify the CRAs of Gorman's dispute, the court acknowledged that "Gorman has no private right of action under § 1681s-2(a)(3) to proceed against MBNA for its initial failure to notify the CRAs that he disputed" the delinquency notation. App., *infra*, 31a. But it held that "Gorman does have a private right of action [under § 1681s-2(b)] * * * to challenge MBNA's subsequent failure to so notify the CRAs after receiving notice of Gorman's dispute" from the CRAs and conducting an investigation. App., *infra*, 31a. In the court's view, when a furnisher reports the results of its investigation to the CRAs, if it does not also report that a dispute exists, the reported information could be "incomplete or inaccurate." App., *infra*, 31a-32a. Thus, even though (1) the information that MBNA furnished after its investigation of the dispute was accurate, (2) MBNA learned of the dispute from the three major CRAs, and (3) those CRAs already knew

of the dispute, MBNA could be held liable for not echoing back to those same CRAs "that the delinquent debt was disputed." App., *infra*, 30a.

3. The Ninth Circuit denied MBNA's petition for rehearing and rehearing en banc, but the panel modified its opinion to address MBNA's conflict-preemption argument. App., *infra*, 2a.

Although the panel believed that that argument had not been presented initially, it went on to reject MBNA's conflict-preemption argument, reasoning that the state cause of action is not inconsistent with FCRA. App., *infra*, 57a-59a n.35. Because, in the panel's view, the California private right of action was not preempted under FCRA's express preemption provision, it could not be preempted as "'inconsistent' with an overarching congressional purpose" under Section 1681t(a) of FCRA and ordinary conflict preemption principles, absent a showing that it was impossible to comply with both state and federal law. App., *infra*, 57a-59a n.35.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION EXPOSES FURNISHERS TO NEW LIABILITY AND WILL HARM THE INTEGRITY OF CREDIT INFORMATION

A. The Liability Imposed On Furnishers By The Decision Below Will Discourage Furnishers From Providing Critical Credit Information

The Ninth Circuit's interpretation of FCRA imposes substantial liability and litigation costs onto furnishers—voluntary actors (such as banks, and other lenders, landlords, telecommunications providers, debt collectors, and public utilities) who play a critical role in the functioning of our Nation's system of banking and lending.

Such undue furnisher liability and litigation has the potential to cause grave harm to our Nation's economy. Lenders rely heavily on the accuracy of consumer credit reports. Indeed, in FCRA, Congress expressly found that the "banking system is dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. § 1681(a)(1). Those credit reports could not be generated without the 30,000 furnishers who voluntarily provide consumer information to CRAs, and it is therefore critical that furnishers not be deterred in this regard. But if left uncorrected, the Ninth Circuit's ruling in this case will have precisely that chilling effect. As

the Federal Trade Commission and five federal banking regulators have explained in promulgating FCRA regulations, unduly burdensome regulation causes "furnishers to cease or limit their furnishing of information to CRAs [and] act[s] as an obstacle to entities becoming furnishers." 74 Fed. Reg. at 31,488.

Indeed, the National Association of Screening Agencies has reported that the Ninth Circuit's decision in this case already has caused many landlords to stop furnishing information about their tenants. *See* Nat'l Ass'n of Screening Agencies' C.A. Amicus Br. in Support of Pet. for Reh'g En Banc, at 2.

Not only will businesses suffer as a result, but consumers will, too. Credit reports help lenders spot good risks as well as bad risks—thus, they can charge less to good risks and more to bad risks. In a landscape where furnishers are deterred from providing information to CRAs for fear of liability and litigation, however, the accuracy of the average consumer's credit report will suffer.[3] With less furnisher information in credit reports, credit grantors will

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[3] *See* Fed. Trade Comm'n, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 6 (Dec. 2004) ("2003 FTC Report"), *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf (last visited Mar. 10, 2010) ("This flow of information [among furnishers, CRAs, and lenders] enables credit grantors and others to make fast and accurate decisions about a consumer's eligibility for various products and services, which benefits both lenders and consumers. Indeed, in the U.S., consumers can typically obtain credit from a complete stranger within minutes.").

have less ability to assess risk, and hence may constrict the population to which they will extend consumer credit.

B. The Ninth Circuit's Decision Will Exact Enormous Costs On The Industry Without Any Benefit To Consumers

Ironically, the decision below provides no benefit to consumers. For example, the Ninth Circuit's ruling that furnishers may be liable for not echoing back to CRAs the fact that the consumer has disputed the furnished information will in no way improve the accuracy of credit files. The CRAs already know that there is a dispute; indeed, they are the ones that notified the furnisher of the dispute.

Moreover, consumers who are dissatisfied with the investigations' results already have a statutory right under FCRA to add a notation of the dispute to their credit files, and the CRAs must report that notation in each subsequent credit report. *See* 15 U.S.C. § 1681i(b), (c). The echo-back obligation, therefore, adds nothing new to the mix of information available to CRAs or their customers.

The Ninth Circuit's decision will, however, impose enormous costs on the credit reporting industry. The three nationwide CRAs maintain files on approximately 200 million consumers in the United States and issue more than 1.5 billion credit reports annually. 2003 FTC Report at 8. The credit reporting industry has developed automated systems to

facilitate the processing of such enormous amounts of data.

The vast majority of all consumer disputes—well over 80%—are processed on Automated Consumer Dispute Verification forms through the industry's electronic dispute processing system known as e-OSCAR (Online Solution for Complete and Accurate Reporting). *See* Fed. Trade Comm'n & Bd. of Governors of the Fed. Reserve Sys., *Report to Congress on the Fair Credit Reporting Act Dispute Process*, at 15-17, App'x C (Aug. 2006), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/fcradispute/fcradispute200608.pdf (last visited Mar. 10, 2010). These automated systems, which have been carefully developed over several years to accommodate FCRA's requirements, do not provide a mechanism for reporting an account as "disputed" under FCRA when a furnisher reports the results of its investigation to the CRA—no doubt because the CRA already knows it is disputed. Accordingly, the ruling below will mandate that the industry make substantial and costly modifications to these systems, even though these burdensome changes will not benefit consumers in any way.

This Court's intervention is necessary to make clear that these burdens on the credit reporting system, and thus on the Nation's economy, are not required by FCRA. The Court should not await further interpretations of FCRA's provisions by other circuits, because due to the nationwide scope of the automated systems in place, the ruling below will

take immediate effect nationwide, making further appellate review of these issues elusive.

II. REVIEW IS NECESSARY TO REVERSE THE NINTH CIRCUIT'S UNWARRANTED EXPANSION OF PRIVATE DAMAGES ACTIONS AGAINST FURNISHERS

A. The Ninth Circuit's Recognition Of A Private Action Under Section 1681s-2 Of FCRA For Failing To "Echo Back" A Dispute To A CRA Is Contrary To The Statute's Text, Structure, And Purpose

In holding that furnishers may be held liable under Section 1681s-2(b) of FCRA for not echoing back to the CRAs that the consumer has disputed credit information with the CRAs, the Ninth Circuit recognized a cause of action that is unsupported by the text and purpose of FCRA.

Section 1681s-2 imposes two sets of duties on furnishers, with subsection (a) relating to furnishers' accuracy obligations when initially furnishing information to CRAs, including reporting disputes with the furnisher, and subsection (b) relating to furnishers' duties to investigate and report after being notified by a CRA of a consumer dispute concerning information that already has been furnished. *See* 15 U.S.C. § 1681s-2(a), (b).

To ensure that furnishers not be exposed to a private action by any and every consumer who disagrees with information that has been furnished to a CRA, Congress permitted private litigation only for

violations of Section 1681s-2(b). Thus, in subsections (c) and (d) of Section 1681s-2, Congress specified that FCRA's private rights of action "do not apply to any violation of * * * subsection (a)" because subsection (a) duties are "enforced exclusively as provided under section 1681s" by "Federal agencies and officials" and "State officials." 15 U.S.C. § 1681s-2(c)(1), (d). By contrast, subsections (c) and (d) place no limitation on the use of FCRA's private rights of action for alleged violations of subsection (b). Section 1681s-2(b) and the limitations on private lawsuits, therefore, serve as a "filtering mechanism" akin to an administrative scheme that must be exhausted, thereby protecting furnishers against undue litigation.

As the Ninth Circuit acknowledged (App., *infra*, 31a), a furnisher's obligation to report that a consumer disputes information is imposed by Section 1681s-2(a), which requires that if the "completeness or accuracy" of any furnished information is disputed *to the furnisher*, then the furnisher "may not furnish the information to any [CRA] without notice that such information is disputed by the consumer." 15 U.S.C. § 1681s-2(a)(3). This requirement serves to advise the CRA of the existence of the dispute, when the consumer may not have directly notified the CRA,

so that the dispute may be reflected in the CRA's files.[4]

By contrast, nothing in Section 1681s-2(b) imposes any obligation on the furnisher to report to a CRA that a consumer disputes furnished information. Rather, Section 1681s-2(b) requires the furnisher, upon receiving notice of a dispute *from a CRA*, to "conduct an investigation" and "report the results of the investigation to the [CRA]." 15 U.S.C. § 1681s-2(b)(1)(A), (C). Additionally, "if the investigation finds that the information is incomplete or inaccurate," then the furnisher must "report those results to all other [CRAs] to which the [furnisher] furnished the information." *Id.* § 1681s-2(b)(1)(D).

The Ninth Circuit nevertheless recognized a cause of action for a furnisher's failure to comply with the duty to notify CRAs of disputes in Section 1681s-2(a)(3) by holding that failure to so notify the CRAs may make information reported to them "incomplete or inaccurate" under Section 1681s-2(b)(1)(D). But such a claim is not supported by the text of Section 1681s-2(b), as nothing in that section requires furnishers to notify CRAs of consumer disputes or authorizes the private action the court of appeals allowed.

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[4] For a recent FTC enforcement of this and other provisions resulting in a $1.1 million civil penalty against a furnisher, *see* http://www.ftc.gov/os/caselist/0623226/100303creditcollectiondecree.pdf.

And creating such a private claim makes little sense. A furnisher's Section 1681s-2(b) obligations are not invoked unless the CRA *already knows* of the dispute and in fact notified the furnisher of it. Here, for example, Gorman already had lodged disputes with all three CRAs, which had in turn notified MBNA of the disputes. Yet the Ninth Circuit held that MBNA could be held liable for not telling the CRAs what they already knew: that Gorman disputed the furnished information. No consumer or public policy interest is served by creating such an obligation, much less imposing liability for failing to perform it.

Moreover, the liability standard that the Ninth Circuit established for its new FCRA cause of action is unworkable. The ruling below held that a furnisher can be held liable if "the omission of the dispute was misleading in such a way and to such an extent that it can be expected to have an adverse effect." App., *infra*, 35a (internal citation, quotation marks and brackets omitted). The Ninth Circuit drew that standard from the Fourth Circuit's decision in *Saunders v. Branch Banking & Trust Co. of Virginia*, 526 F.3d 142 (4th Cir. 2008).

But, in a joint rulemaking to promulgate regulations under another provision of FCRA, the Federal Trade Commission and five other federal banking regulators have expressly found that "it could be difficult or *impossible* for furnishers to predict what information third parties would find relevant or material." 74 Fed. Reg. at 31,490 (emphasis added).

The FTC and regulators determined that there is a broad "range and diversity of users of consumer reports" who find different information relevant and useful, especially given "the use of various proprietary credit scoring models and underwriting methodologies." *Ibid.* Thus, the federal government deemed a proposed regulation with a standard similar to the Fourth and Ninth Circuit's rule "unworkable," because "furnishers cannot be expected to identify all types of information that, if omitted, could reasonably be expected to contribute to an incorrect evaluation of a consumer's creditworthiness by a user of a consumer report." *Ibid.*

B. Review Is Warranted Because The Ninth Circuit Upended FCRA's Preemption Provisions By Permitting State Law Private Rights Of Action Against Furnishers

In addition to incorrectly expanding the private claims available under FCRA, the Ninth Circuit dramatically expanded the availability of state-law claims, by reading FCRA to allow private suits against furnishers in California. This Court's review is warranted to correct the Ninth Circuit's erroneous preemption ruling, which is contrary to every federal and state court decision that preceded it.

1. The ruling below that California's private right of action is not expressly preempted is contrary to FCRA's text and purpose

a. Absent a clause saving part of it from preemption, Section 1681t(b)(1)(F) of FCRA would expressly preempt California Civil Code Section 1785.25 in its entirety because FCRA's preemption provision extends to any state law "requirement or prohibition * * * with respect to any subject matter regulated under * * * section 1681s-2 of [FCRA], relating to the responsibilities of persons who furnish information to [CRAs]." 15 U.S.C. § 1681t(b)(1)(F).

The reach of the savings clause in that broad preemption provision is exceptionally narrow. It saved California Civil Code Section 1785.25(a), which merely prohibits the furnishing of information that the furnisher "knows or should know" is "incomplete or inaccurate." Congress did not save from preemption any other subsection of 1785.25, including subsection 1785.25(g), which makes furnishers "liable for failure to comply with this section." Cal. Civ. Code § 1785.25(g). Nor did it exempt from preemption the private right of action in California Civil Code Section 1785.31, which permits "[a]ny consumer who suffers damages as a result of a violation of this title" to sue.

Section 1681s-2 of FCRA regulates not only the *conduct* of furnishers, but also limits *who can sue* for violations of the section's obligations. Section 1681s-2(d) places specific limits on the enforcement of

laws relating to furnishers' obligations, mandating that violations of Subsection 1681s-2(a) of FCRA "shall be enforced exclusively" by "Federal agencies and officials and * * * State officials." 15 U.S.C. § 1681s-2(d). Thus, by preempting any state law "with respect to the subject matter regulated under" any provision of Section 1681s-2, including that section's enforcement limitations, Section 1681t(b)(1)(F) precludes California from authorizing enforcement of any state law regulating furnisher's obligations by anyone other than the federal and state agencies and officials specified in FCRA.

Nevertheless, the Ninth Circuit held that Congress did not need to exempt Section 1785.31 from preemption because the private right of action is not, by itself, a "requirement or prohibition." App., *infra*, 52a-54a. The court reached this erroneous conclusion by taking those words out of context from this Court's opinion in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). That case did not involve a carefully structured congressional scheme balancing governmentally enforceable obligations with protections for furnishers against liability and litigation.

The Ninth Circuit also erroneously concluded that, given that FCRA already allows state officials to enforce its federal provisions, it would have made no sense for Congress to have left in place California Civil Code Section 1785.25(a) without also leaving in place the private enforcement mechanisms in California Civil Code Sections 1785.25(g) and 1785.31. This conclusion flowed from the Ninth Circuit's belief that

the federal and state substantive standards are identical and that state officials would therefore have no need to enforce the state law. App., *infra*, 51a-52a. The Ninth Circuit's belief was wrong.

When Congress first saved California Civil Code Section 1785.25(a) from preemption in 1996, the substantive standards were very different from that imposed by FCRA. While the California statute prohibited (and continues to prohibit) furnishing information that the furnisher "knows or should know" is inaccurate, Cal. Civ. Code § 1785.25(a) (1996), the FCRA standard then prohibited furnishing information that the furnisher "knows or consciously avoids knowing" is inaccurate, 15 U.S.C. § 1681s-2(a)(1)(A) (1996). Today, the state and federal standards are still worded differently and may not be the same. FCRA now prohibits furnishing information that the furnisher "knows or has reasonable cause to believe" is inaccurate, but "reasonable cause to believe" is defined to mean "having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information." 15 U.S.C. § 1681s-2(a)(1)(A), (D).

In any event, even when the substantive standards are the same, Congress limited the remedies States could seek under FCRA for violations of Section 1681s-2 to injunctive relief unless the person has previously violated an injunction. 15 U.S.C. § 1681s(c)(5). By contrast, the California Attorney General has authority under state law to enforce

California Civil Code Section 1785.25(a) against furnishers under the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, 17204, 17206, which provides a broader range of remedies.

Thus, contrary to the court of appeals' reasoning, California Civil Code Section 1785.25(a) serves a critical role even though the private enforcement action in Section 1785.31 is preempted. Congress expressly authorized the chief law-enforcement officer of each State to enforce FCRA "[i]n addition to such other remedies as are provided under State law." 15 U.S.C. § 1681s(c)(1). That provision preserves the State's authority to bring "whatever actions and remedies may be available under state law" to enforce state-law obligations that are not preempted by FCRA "either separately or in conjunction with an action under the FCRA." H.R. Rep. No. 103-486, at 54 (1994).

b. The ruling below also misinterpreted Section 1681t(a) of FCRA, which preempts any state law that is "inconsistent with any provision" of FCRA. The Ninth Circuit held that this provision does not fully embody ordinary conflict preemption principles.

But that holding is directly contrary to this Court's precedent. In *Geier v. American Honda Motor Co.*, this Court held that a savings clause in an express preemption provision simply "removes [state-law] actions from the scope of the *express* pre-emption clause" and "does *not* bar the ordinary working of *conflict* pre-emption principles." 529 U.S. 861, 869

(2000) (first and third emphases added); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (same).

Moreover, the Ninth Circuit was wrong to hold that Section 1681t(a)'s "inconsistency" provision means that a state law is preempted only if it is impossible to comply with both the state and federal law. App., *infra*, 57a-59a n.35. In *Sprietsma*, this Court made clear that the existence of an express preemption provision does not preclude the working of ordinary conflict preemption principles *and* that those principles require preemption not only where it is impossible to comply with both state and federal law but also "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 537 U.S. at 65 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks and citations omitted)). Thus, the ruling below that frustration-of-purpose preemption does not apply to the California statute at issue is patent error.[5]

Moreover, other federal statutes that contain similar preemption language to Section 1681t(a) of

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[5] The Ninth Circuit's reliance on the FTC's commentary that appears to view Section 1681t(a) as comprising only impossibility preemption is misplaced. *See* App., *infra*, 59a n.35 (citing 16 C.F.R. pt. 600 appx. § 622 ¶ 1). That commentary was issued before this Court's opinions in *Geier* and *Sprietsma*, and to the extent that it can be read to support the ruling below, it is contrary to this Court's decisions.

FCRA make clear that state laws may be inconsistent with federal law if they provide consumers additional rights or remedies than those provided under federal law. When Congress wants to permit such rights and remedies, it does so by expressly stating that a state law is not "inconsistent" with federal law "if the protection such law affords any consumer is greater than the protection provided by this subchapter." *E.g.*, 15 U.S.C. §§ 1692n (Fair Debt Collection Practices Act), 1693q (Electronic Fund Transfer Act), 6807(b) (Gramm-Leach-Bliley Act). That Congress chose not to include such language in FCRA belies the Ninth Circuit's reasoning that Section 1681t(a) embodies only impossibility preemption and that additional state-law remedies beyond those permitted under FCRA cannot be inconsistent with FCRA. *See* App., *infra*, 59a n.35.

Under a proper preemption analysis, the private right of action in California Civil Code Section 1785.31 for violations of furnishers' accuracy obligations under California Civil Code Section 1785.25(a) is preempted because it frustrates Congress's purpose in enacting the furnisher provisions of FCRA. The obligations of California Civil Code Section 1785.25(a), like Section 1681s-2(a) of FCRA, are imposed on furnishers regardless of whether a consumer has notified a CRA of a dispute. A private action for a violation of Section 1785.25(a) is thus patently inconsistent with FCRA, because it circumvents the critical "filtering mechanism"—i.e., the remedial scheme—that Congress intended to limit the nature and number of

consumer suits against furnishers. Such a private action therefore is preempted because it would frustrate Congress's purpose and, contrary to that purpose, would allow a consumer to dispute the accuracy of information provided by a furnisher to a CRA *for the very first time* in a lawsuit against the furnisher.[6]

2. *The Ninth Circuit's decision diverged sharply from every federal and state court ruling that preceded it*

a. The Ninth Circuit's preemption holding in this case is contrary to every federal court and state appellate court decision that preceded it.

The decision below is contrary to decisions of the California Courts of Appeal, which before the Ninth Circuit's decision in this case had uniformly held that the California private right of action was preempted under Section 1681t(b)(1)(F) of FCRA.[7] And the Ninth

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[6] Even though the Ninth Circuit suggested in its amended opinion that MBNA may not have properly raised the "inconsistency" preemption argument, it nevertheless reached the issue by ruling on the scope of Section 1681t(a)'s preemption provision. *See* App., *infra*, 59a n.35 (referring to its "holding concerning the scope of the FCRA preemption provisions," including Section 1681t(a)). Because the court below passed on the issue, the question is preserved for review by this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (questions that are "pressed or passed upon below" by the court below are preserved for review by this Court).

[7] *See Liceaga v. Debt Recovery Solutions, LLC*, 169 Cal. App. 4th 901, 909 (2008), petition for review denied and opinion decertified, 86 Cal. Rptr. 3d 876 (2009); *Banga v. World Sav. &*

(Continued on following page)

Circuit reached the opposite conclusion from that reached by every district court, roughly a dozen different federal judges, to have considered the question."

b. The Ninth Circuit also diverged sharply from how other courts have read Section 1681t(a) of FCRA, which preempts any state law that is "inconsistent" with FCRA. 15 U.S.C. § 1681t(a). The court of appeals

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Loan Ass'n, No. A108446, 2006 WL 1467967, at *3 (Cal. Ct. App. May 30, 2006), cert. denied, 549 U.S. 1217 (2007); *Potter v. Illinois Student Assistance Comm'n*, No. D042493, 2004 WL 1203156, at *4-7 (Cal. Ct. App. June 2, 2004). After the Ninth Circuit panel issued its opinion in this case, a district of the California Court of Appeal parted ways from the earlier state court rulings and relied heavily on the Ninth Circuit's opinion to make the same error as the court below, ruling that California's private right of action against furnishers is not preempted by FCRA. *See Sanai v. Saltz*, 170 Cal. App. 4th 746 (2009), petition for review denied, No. S170840, 2009 Cal. LEXIS 4193 (Cal. Apr. 29, 2009).

" *See Buraye v. Equifax*, No. CV-08-00423, 2008 WL 4352388 (C.D. Cal. June 6, 2008); *Drew v. Equifax Info. Servs.*, No. C-07-00726, 2007 WL 2028745 (N.D. Cal. July 11, 2007); *Hogan v. PMI Mortgage Ins. Co.*, No. C-05-3851, 2006 WL 1310461 (N.D. Cal. May 12, 2006); *Roybal v. Equifax*, 405 F. Supp. 2d 1177 (E.D. Cal. 2005); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139 (N.D. Cal. 2005); *Lin v. Universal Card Servs. Corp.*, 238 F. Supp. 2d 1147 (N.D. Cal. 2002); *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, No. C-00-1661, 2000 WL 1721069 (N.D. Cal. Nov. 8, 2000); *Leet v. Cellco P'ship*, 480 F. Supp. 2d 422 (D. Mass. 2007); *Dawe v. Capital One Bank*, No. 04-40192, 2007 WL 3332810 (D. Mass. Oct. 24, 2007); *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181 (D. Mass. 2006); *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1 (D. Mass. 2004), aff'd, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005).

interpreted that provision as not preempting a state law unless it is impossible to comply with both federal and state law. App., *infra*, 57a-59a n.35.

That interpretation directly conflicts with that of the Maine Supreme Court, which held that Section 1681t(a) embodies general frustration-of-purpose preemption principles such that it preempts any state law that "frustrates, or stands as an obstacle to, the accomplishment of the '*full* purposes and objectives of Congress.'" *Equifax Servs., Inc. v. Cohen*, 420 A.2d 189, 211 (Me. 1980) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), cert. denied, 450 U.S. 916 (1981). The district courts across the nation have likewise repeatedly and uniformly concluded that Section 1681t(a) preempts any state private right of action that permits a consumer to obtain a remedy that is different from the remedies authorized by FCRA. *See Knudson v. Wachovia Bank, N.A.*, 513 F. Supp. 2d 1255, 1260-1261 (M.D. Ala. 2007); *Smith v. Equifax Info. Servs., LLC*, 522 F. Supp. 2d 822, 825 (E.D. Tex. 2007); *Jarrett v. Bank of Am.*, 421 F. Supp. 2d 1350, 1353-1354 (D. Kan. 2006); *Poulson v. Trans Union, LLC*, 370 F. Supp. 2d 592, 593 (E.D. Tex. 2005).

This Court's review is warranted to clarify this divergence of authority and to restore the delicate balance that Congress struck in FCRA between accuracy obligations and enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 15, 2010

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN C. GORMAN, an individual, *Plaintiff-Appellant*, v. WOLPOFF & ABRAMSON, LLP; MBNA AMERICA BANK, N.A., *Defendants-Appellees.*	No. 06-17226 D.C. No. CV-04-04507-JW ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
July 17, 2008—San Francisco, California

Filed January 12, 2009
Amended October 21, 2009

Before: Richard A. Paez and Marsha S. Berzon, Circuit Judges, and Harold Baer,* District Judge.

Opinion by Judge Berzon

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* The Honorable Harold Baer, Jr., Senior United States District Judge for the Southern District of New York, sitting by designation.

COUNSEL

John C. Gorman and Charles J. Stiegler, San Jose, California, for the plaintiff-appellant.

Tomio B. Narita and Jeffrey A. Topor, San Francisco, California, for the defendants-appellees.

ORDER

The opinion filed January 12, 2009, is hereby amended. The amended opinion is attached hereto.

With these amendments, the panel unanimously has voted to deny Appellant's petition for rehearing en banc and Appellee's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing is DENIED and the petitions for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

BERZON, Circuit Judge:

John Gorman tried to buy a satellite television system using his credit card, issued by MBNA

America Bank. He was unsatisfied with the system purchased, and lodged a challenge with MBNA to dispute the charge. Unhappy with MBNA's response, Gorman instituted this lawsuit against MBNA, alleging violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, libel, and violations of California Civil Code section 1785.25(a). The district court dismissed his California statutory claim and granted MBNA summary judgment on the other causes of action. *Gorman v. Wolpoff & Abramson, LLP* ("*Gorman I*"), 370 F. Supp. 2d 1005 (N.D. Cal. 2005); *Gorman v. Wolpoff & Abramson, LLP* ("*Gorman II*"), 435 F. Supp. 2d 1004 (N.D. Cal. 2006). We affirm in part and reverse in part.

I. BACKGROUND

In December 2002, John Gorman paid for the delivery and installation of a new satellite TV system on a Visa credit card issued by MBNA America Bank ("MBNA"). The charge, $759.70, was posted on his January 2003 credit card statement. According to Gorman, the merchant, Four Peaks Home Entertainment ("Four Peaks"), delivered a used and defective TV system and botched the installation, damaging his house in the process. Gorman told Four Peaks he was refusing delivery of the goods and asked for a refund, but Four Peaks refused to refund the charges unless

Gorman arranged to return the TV system. The defective equipment is still in Gorman's possession.[1]

In February 2003, Gorman notified MBNA that he was disputing the charges and submitted copies of emails between himself and Four Peaks. The attached emails showed that Gorman had informed a Four Peaks representative that the delivered goods were "unacceptable and [were] rejected." He also noted damage from the installation and notified Four Peaks that he "plan[ned] to dispute the credit card charges in their entirety, as the damage exceeds the amount of the charges."

MBNA responded to the dispute notice with a request for additional information from Gorman about the dispute, including proof that the merchandise had been returned. A month passed, and MBNA wrote Gorman again, stating that as he had not

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[1] MBNA claims that Four Peaks shipped Gorman new, replacement equipment and that Gorman retains both the defective and replacement equipment. Gorman disputes having received any replacement system. Gorman also claims that he made the merchandise available to Four Peaks for pickup, and that doing so was sufficient to require a refund under Cal. Com. Code section 2602(2)(b) ("If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this division (subdivision (3) of Section 2711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them."). He also testified in his deposition that Four Peaks never sent him prepaid shipping labels. It is not clear whether he would have shipped the merchandise back had he received such labels.

responded, it assumed the charge was no longer disputed. Gorman answered that he continued to dispute the charge, and referred MBNA to his original notice of dispute. He did not claim to have returned the equipment, but stated that the merchandise "has been available for the merchant to pick up." MBNA again requested proof that the goods had been returned; Gorman did not reply.

In April 2003, MBNA informed Gorman that it was "unable to assist [him] because the merchandise has not been returned to the merchant." Gorman called an MBNA representative saying, again, that all relevant information was in his original letter. MBNA then contacted Four Peaks, which told MBNA that it had shipped replacement equipment to Gorman but that he had not sent the old equipment back to them.

In July 2003, MBNA again informed Gorman that it could not obtain a credit on his behalf without further information from him. Gorman, who is a lawyer, responded in writing on his law firm's letterhead, stating that MBNA had all the information it needed, that he had left several unanswered messages with MBNA asking to speak with someone about the dispute, and that he would "never" pay the disputed charge. He further stated that MBNA had violated the Fair Credit Billing Act, that he was "entitled to recover attorneys' fees for MBNA's violation," and that he was offsetting his legal fees against his current account balance and so would make no more payments on the card, for the TV

system or anything else.[2] The balance at that time was more than $6,000.[3]

Gorman's letter to MBNA worked, at least temporarily. In August 2003, MBNA removed the Four Peaks charge and related finance charges and late fees from Gorman's credit card bill. Over the next two months, MBNA again contacted Four Peaks, which once more informed MBNA that it would not issue a credit for Gorman's charge until he returned the refused equipment. When MBNA called Gorman, he informed them he had the merchandise and "ha[d] no intention of ever [returning] it." In October, MBNA reposted the charge to Gorman's account.

After he stopped making payments on his card, Gorman claims, he received numerous harassing phone calls. During one of these calls, Gorman alleges, an MBNA representative told him, "We're a big bank. You either pay us or we'll destroy your credit."

In January 2004, MBNA reported Gorman's account to the credit reporting agencies ("CRAs") as

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[2] Gorman has not indicated any specific basis for his fees claim. He refused to answer questions at his deposition about whether these fees were for services he had personally performed, claiming attorney-client and work product privilege. No suit had been filed at the time Gorman claimed entitlement to these fees.

[3] As far as the record reveals, the entire balance remains unpaid.

"charged-off."[1] Between May 2004 and November 2005, Gorman informed the three major credit reporting agencies (Equifax, TransUnion, and Experian) that their credit reports included inaccurate information.

As required by federal law, the CRAs sent MBNA notices of dispute containing descriptions of Gorman's complaints (as understood by the CRAs) and asking the bank to verify the accuracy of his account records. MBNA responded by reviewing the account records and notes. After ascertaining that its prior investigation did not support Gorman's claimed dispute, MBNA notified the CRAs that the delinquency was not an error. According to Gorman, MBNA did not notify the CRAs that the charges remained in dispute, and the CRAs did not list the charges as disputed.[2]

Since his credit reports began listing his MBNA account as delinquent, Gorman has been denied credit altogether or offered only high interest rates on at least three occasions. He contends that the MBNA

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[1] MBNA also referred the debt to a law firm, Wolpoff & Abramson, for collection. The firm's attempt to collect the debt gave rise to unfair debt collection practices claims in Gorman's complaint. Gorman does not appeal the district court's entry of judgment against him on these claims.

[2] Gorman did not initially supply the district court with his credit reports. In support of his motion to reconsider the district court's summary judgment order, however, Gorman submitted copies of his credit reports, which include no indication that the MBNA account is disputed.

account is the only negative entry on his credit report.

In September 2004, Gorman sued MBNA. The complaint alleges violations of the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x and a California credit reporting law, California Civil Code section 1785.25(a), and also alleges a claim for libel. Gorman seeks injunctive relief, damages resulting from MBNA's reporting of his account, and damages from lost wages for the time he spent dealing with his credit that he would have otherwise spent billing clients. The district court dismissed Gorman's California statutory claim as preempted and granted MBNA summary judgment on all other claims. Gorman timely appeals.

For the reasons stated below, we affirm in part and reverse in part the district court's grant of summary judgment on the FCRA claims; we affirm the district court's grant of summary judgment on Gorman's libel claim; and we reverse the district court's dismissal of Gorman's California statutory claim.

II. ANALYSIS

This case comes to us on summary judgment. We review a grant of summary judgement *de novo*. *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 742 (9th Cir. 2004). Summary judgement is appropriate where, "drawing all reasonable inferences supported by the evidence in favor of the non-moving party," the court finds "that

no genuine disputes of material fact exist and that the district court correctly applied the law." *Id.* (internal quotation omitted). The non-moving party "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial." *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986)).

Questions of statutory interpretation and federal preemption are, of course, reviewed *de novo*. *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1047 (9th Cir. 2007); *Davis v. Yageo Corp.*, 481 F.3d 661, 673 (9th Cir. 2007).

A. Fair Credit Reporting Act Claims

1. Statutory Background

Congress enacted the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x,[4] in 1970 "to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 127 S.Ct. 2201, 2205 (2007). As an important means to this end, the Act sought to make "consumer reporting agencies exercise their grave responsibilities [in assembling and evaluating consumers' credit, and disseminating information about consumers' credit]

[4] All references to the FCRA hereafter are to 15 U.S.C.

with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). In addition, to ensure that credit reports are accurate, the FCRA imposes some duties on the sources that provide credit information to CRAs, called "furnishers" in the statute.[7] Section 1681s-2 sets forth "[r]esponsibilities of furnishers of information to consumer reporting agencies," delineating two categories of responsibilities.[8] Subsection (a) details the duty "to provide accurate information," and includes the following duty:

> (3) Duty to provide notice of dispute
>
> If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

§ 1681s-2(a)(3).

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[7] "The most common . . . furnishers of information are credit card issuers, auto dealers, department and grocery stores, lenders, utilities, insurers, collection agencies, and government agencies." H.R. Rep. No. 108-263, at 24 (2003).

[8] This section was added by the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, § 2413, 110 Stat. 3009-447. Additional amendments, not relevant here, were made by the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952.

Section 1681s-2(b) imposes a second category of duties on furnishers of information. These obligations are triggered "upon notice of dispute"—that is, when a person who furnished information to a CRA receives notice from the CRA that the consumer disputes the information. *See* § 1681i(a)(2) (requiring CRAs promptly to provide such notification containing all relevant information about the consumer's dispute). Subsection 1681s-2(b) provides that, after receiving a notice of dispute, the furnisher shall:

> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the [CRA] pursuant to section 1681i(a)(2) . . . ;
>
> (C) report the results of the investigation to the [CRA];
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other [CRAs] to which the person furnished the information . . . ; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1) . . . (i) modify . . . (ii) delete [or] (iii) permanently block the reporting of that item of information [to the CRAs].

§ 1681s-2(b)(1). These duties arise only after the furnisher receives notice of dispute from a CRA; notice of a dispute received directly from the consumer does not trigger furnishers' duties under subsection (b). *See id.*; *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059-60 (9th Cir. 2002).

The FCRA expressly creates a private right of action for willful or negligent noncompliance with its requirements. §§ 1681n & o; *see also Nelson*, 282 F.3d at 1059. However, § 1681s-2 limits this private right of action to claims arising under subsection (b), the duties triggered upon notice of a dispute from a CRA. § 1681s-2(c) ("Except [for circumstances not relevant here], sections 1681n and 1681o of this title do not apply to any violation of . . . subsection (a) of this section, including any regulations issued thereunder."). Duties imposed on furnishers under subsection (a) are enforceable only by federal or state agencies.[7] *See* § 1681s-2(d).

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[7] *Nelson* explained the likely reason for allowing private enforcement of subsection (b) but not subsection (a) as follows:

> Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished. Hence, Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental bodies. But Congress did provide a filtering mechanism in § 1681s-2(b) by making the disputatious consumer notify a CRA and setting up the CRA to receive notice of the investigation by the furnisher. *See* 15 U.S.C. § 1681i(a)(3) (allowing CRA to terminate reinvestigation of disputed

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Gorman alleges that MBNA violated several of the FCRA "furnisher" obligations. We hold that some of the alleged violations survive summary judgment and some do not.

2. MBNA's "investigation" upon notice of dispute

Gorman's first allegation is that MBNA did not conduct a sufficient investigation after receiving notice from the CRAs that he disputed the charges, as required by § 1681s-2(b)(1)(A). As Gorman's claim arises under subsection (b), it can be the basis for a private lawsuit. *See Nelson*, 282 F.3d at 1059-60. We must decide (1) whether § 1681s-2(b)(1)(A) requires a furnisher to conduct a "reasonable" investigation, and if so, (2) whether a disputed issue of material fact exists as to the reasonableness of MBNA's investigation.

a. Must an Investigation be Reasonable?

The text of the FCRA states only that the creditor shall conduct "an investigation with respect to the

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item if CRA "reasonably determines that the dispute by the consumer is frivolous or irrelevant"). With this filter in place and opportunity for the furnisher to save itself from liability by taking the steps required by § 1681s-2(b), Congress put no limit on private enforcement under §§ 1681n & o.

Nelson, 282 F.3d at 1060.

disputed information." § 1681s-2(b)(1)(A). MBNA urges that because there is no "reasonableness" requirement expressly enunciated in the text, the FCRA does not require an investigation of any particular quality; *any* investigation into a consumer's dispute—even an entirely unreasonable one—satisfies the statute.

This court has not addressed MBNA's contention about the FCRA's investigation requirement.[10] But, MBNA made—and lost—the same argument before the Fourth Circuit. *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 429-31 (4th Cir. 2004). Concluding that the statute includes a requirement that a furnisher's investigation not be unreasonable, the Fourth Circuit first noted that the plain meaning of the term "investigation" is a "'detailed inquiry or systematic examination,'" which necessarily "requires some degree of careful inquiry." *Id.* at 430 (quoting *Am. Heritage Dictionary* 920 (4th ed. 2000)). Second, the Fourth Circuit reasoned that because the purpose of the provision is "to give consumers a means to dispute—and, ultimately, correct—inaccurate information on their credit reports," *id.* at 430-31, a "superficial, *un*reasonable inquir[y]" would hardly satisfy Congress' objective. *Id.* at 431. The Seventh

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[10] District courts in this circuit have assumed that § 1681s-2(b)(1)(A) requires a reasonable investigation. *See, e.g., Smith v. Ohio Sav. Bank*, No. 2:05-cv-1236, 2008 WL 2704719, at *2 (D. Nev. July 7, 2008); *Thomas v. U.S. Bank, N.A.*, No. CV 05-1725, 2007 WL 764312, at *4 (D. Or. Mar. 8, 2007).

Circuit, without discussing the issue, has also found an implicit reasonableness requirement. *See Westra v. Credit Control of Pinellas*, 409 F.3d 825, 827 (7th Cir. 2005) ("Whether a defendant's investigation [pursuant to § 1681s-2(b)(1)(A)] is reasonable is a factual question normally reserved for trial."); *see also Johnson*, 357 F.3d at 430 n.2 ("[D]istrict courts that have considered the issue have consistently recognized that the creditor's investigation must be a reasonable one." (citing cases)).

The Fourth Circuit's reasoning in *Johnson* is entirely persuasive. By its ordinary meaning, an "investigation" requires an inquiry likely to turn up information about the underlying facts and positions of the parties, not a cursory or sloppy review of the dispute. Moreover, like the Fourth Circuit, we have observed that "a primary purpose for the FCRA [is] to protect consumers against inaccurate and incomplete credit reporting." *Nelson*, 282 F.3d at 1060. A provision that required only a cursory investigation would not provide such protection; instead, it would allow furnishers to escape their obligations by merely rubber stamping their earlier submissions, even where circumstances demanded a more thorough inquiry. MBNA counters by pointing to § 1681i(a)(1)(A), which provides, in relevant part (with emphasis added).

> [I]f the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies

> the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a *reasonable reinvestigation* to determine whether the disputed information is inaccurate. . . .

Thus, MBNA argues, Congress specified a "reasonable" investigation in another part of the statute, and purposely chose not to do so for furnishers of information.

It is most often the case that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation and citation omitted). But we should be careful not to read too much into the apparent disparity in language upon which MBNA relies. Where, as here, there are convincing alternative explanations for a difference in statutory language, the presumption applies with much less force. *See Field v. Mans*, 516 U.S. 59, 67-69 (1995) ("Without more, the [negative] inference might be a helpful one. But [where] there is more . . . the negative pregnant argument should not be elevated to the level of interpretive trump card.").

As we have noted, the term "investigation" on its own force implies a fairly searching inquiry. It is thus likely that, if anything, the "reasonable" qualifier with regard to *re*investigations by CRAs signals a *limitation* on the CRAs' duty, not an expansion of it

beyond what "investigation" itself would signal. And, indeed, the statute goes on to spell out the CRA's investigative duty in some detail, requiring, inter alia, that the CRA provide notification of the dispute within five business days of receipt of notice of a dispute. The furnisher's investigation obligation under § 1681 is triggered by receiving the CRA notification, required as a central aspect of the CRA's own investigation, and includes the obligation to "report the results of [its] investigation to the [CRA]." § 1681s2-(b)(1)(C). In other words, the CRA's "reasonable reinvestigation" consists largely of triggering the investigation by the furnisher. It would make little sense to deem the CRA's investigation "reasonable" if it consisted primarily of requesting a superficial, unreasonable investigation by the furnisher of the information.

Nevertheless, MBNA urges that "Congress intended to impose a more rigorous duty of investigation on CRAs than on furnishers of information." But MBNA does not tell us why Congress would mandate shoddy or superficial furnisher investigations, not calculated to resolve or to explain the actual disagreement or to aid in the CRA's "reasonable reinvestigation." Indeed, as the statute recognizes, the furnisher of credit information stands in a far better position to make a thorough investigation of a disputed debt than the CRA does on reinvestigation. With respect to the accuracy of disputed information, the CRA is a third party, lacking any direct relationship with the consumer, and its responsibility

is to "*re*investigate" a matter once already investigated in the first place. § 1681i(a)(1) (emphasis added). It would therefore make little sense to impose a more rigorous requirement on the CRAs than the furnishers. Instead, the more sensible conclusion is that, if anything, the "reasonable" qualifier attached to a CRA's duty to reinvestigate limits its obligations on account of its third-party status and the fact that it is repeating a task already completed once. Requiring furnishers, on inquiry by a CRA, to conduct at least a reasonable, non-cursory investigation comports with the aim of the statute to "protect consumers from the transmission of inaccurate information about them." *Kates v. Crocker Nat'l Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985).

We thus follow the Fourth and Seventh Circuits and hold that the furnisher's investigation pursuant to § 1681s-2(b)(1)(A) may not be unreasonable.

b. MBNA's Investigation was Reasonable

As discussed, a furnisher's obligation to conduct a reasonable investigation under § 1681s-2(b)(1)(A) arises when it receives a notice of dispute from a CRA. Such notice must include "all relevant information regarding the dispute that the [CRA] has received from the consumer." § 1681i(a)(2)(A). It is from this notice that the furnisher learns the nature of the consumer's challenge to the reported debt, and it is the receipt of this notice that gives rise to the

furnisher's obligation to conduct a reasonable investigation. The pertinent question is thus whether the furnisher's procedures were reasonable in light of what it learned about the nature of the dispute from the description in the CRA's notice of dispute.[11] *See Westra*, 409 F.3d at 827 ("[The furnisher's] investigation in this case was reasonable given the scant information it received regarding the nature of [the consumer's] dispute.").

MBNA received four notices of dispute regarding Gorman's account. Gorman argues that the district court erred in granting summary judgment as to the reasonableness of MBNA's investigation in response to these notices because triable issues of fact remain. We have held that "summary judgment is generally an inappropriate way to decide questions of reasonableness because 'the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment.'" *In re Software Toolworks Inc.*, 50 F.3d 615, 621 (9th Cir. 1994) (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976)). However, summary judgment is not precluded altogether on questions of reasonableness. It is appropriate "when only one conclusion about the conduct's reasonableness is possible." *Id.* at

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[11] In deciding that the notice determines the nature of the dispute to be investigated, we do not suggest that it also cabins the scope of the investigation once undertaken.

622; *see also Westra*, 409 F.3d at 827. We thus consider the sufficiency of MBNA's investigation with respect to each of the notices.

i. "Claims Company will Change"

In a notice of dispute received May 13, 2004, TransUnion provided the following information concerning Gorman's MBNA account: "Claims company will change. Verify all account information." The notice provided no further information about the nature of the dispute. In response to this notice, MBNA "review[ed] the account notes to determine whether MBNA had agreed to delete any charges or to modify the account information in any way." It concluded that "[n]o such commitment had been made." MBNA's review of the account information provided by TransUnion did reveal "some minor differences." As a result, MBNA submitted updated address, date of birth, and account delinquency information to TransUnion.

The cursory notation, "[c]laims company will change," provided no suggestion of the nature of Gorman's dispute with Four Peaks. We conclude therefore that a jury could not find MBNA's response unreasonable. MBNA reasonably read the vague notice as indicating that MBNA had previously agreed to change certain account information. MBNA's review of its internal account files to determine whether any such agreement had been reached was

all that was required to respond reasonably to this notice of dispute. The account notes reveal that MBNA had communicated with Four Peaks several times and do not reveal any agreement by MBNA to credit those charges, or any others. MBNA could not have reasonably been expected to undertake a more thorough investigation of the Four Peaks incident based on the scant information contained in this notice.

ii. "Fraudulent Charges"

MBNA received two notices disputing "fraudulent charges" on Gorman's account. A notice of dispute from Experian, dated May 18, 2004, stated: "Consumer claims account take-over fraudulent charges made on account. Verify Signature provide complete ID." In response to this notice, MBNA "verif[ied] that the name, address, date of birth and social security number reported by Experian matched the information that was contained in MBNA's records concerning the account." It also "review[ed] the account notes and check[ed] with the fraud department to determine whether there had ever been a fraud claim submitted with respect to the account." Because the identification information matched and no fraud claim had been submitted, MBNA reported to Experian that the information it previously reported was accurate and requested that Experian tell Gorman to contact MBNA if he suspected fraud.

MBNA received another dispute notice from TransUnion, dated November 29, 2005, that listed two disputes: (1) "Disputes present/previous Account Status History. Verify accordingly;" (2) "Consumer claims account take-over fraudulent charges made on account. Verify Signature provide or confirm complete ID." MBNA conducted the following inquiry:

> [V]erif[ied] that the account history that was being reported matched the account history data in MBNA's records, including the balance, the amount past due, the high credit and credit limit for the account. . . . [V]erif[ied] that the name, address, date of birth and social security number reported by TransUnion matched the information that was contained in MBNA's records concerning the account. . . . [R]eview[ed] the account notes and check[ed] with the fraud department to determine whether there had ever been a fraud claim submitted with respect to the account.

Because this investigation did not reveal that any information was inaccurate, MBNA verified the information previously submitted to TransUnion.

Neither notice identified the nature of Gorman's dispute as centering on the Four Peaks charge or indicated that the dispute concerned rejection of the goods charged for. Indeed, the notices did not describe the fraudulent transactions in any detail; they were silent as to the approximate date of the charges, their amount, and the identity of the merchant. Moreover,

Gorman has never contended that the disputed charges were initially unauthorized or were the result of identity theft, as the dispute notices indicated. Not surprisingly, MBNA's review of its internal account notes showed no evidence of fraudulent activity, and all previous account data reported by the CRAs matched MBNA's records. We conclude that, as in the case of the first notice of dispute, MBNA could not reasonably have been expected to investigate Gorman's challenge to the Four Peaks charge based on the vague and inaccurate information it received from the CRAs in these notices.[12]

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[12] Gorman complains that he had no control over the information the CRAs gave MBNA, and that MBNA should have asked the CRAs for more detail on Gorman's complaints. But Gorman's letters to the CRAs do not provide much more detail concerning his dispute than the CRAs' description to MBNA. Two of the dispute notices were prompted by letters from Gorman to the CRAs stating:

> MBNA posted certain fraudulent credit card charges to a former VISA account in or about early 2003. I timely notified MBNA that the charges were disputed and should be removed from my account yet MBNA failed to removed [sic] them and is wrongfully claiming that my account is delinquent. No money is owed to MBNA. Moreover, MBNA has been repeatedly advised by me, both orally and in writing, that the debt is disputed but is unlawfully refusing to note the existence of the dispute on my credit record.

The November 2005 dispute notice was prompted by an on-line complaint form filled out by Gorman stating: "I have never made a late payment," and "Fraudulent charges were made on my account."

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iii. "Promised Goods/Services Not Delivered"

One notice of dispute did provide more accurate and specific information relating to Gorman's dispute with MBNA. A December 2004 notice from Experian stated: "Claims inaccurate information. Did not provide specific dispute. Provide complete ID and verify account information." The notice further provided, in a section for "FCRA Relevant Information": "PROMISED GOODS/SERVICES NOT DELIVERED. I TIMELY DISPUTED THE CHARGES UNDER THE TIL ACT."[13] In response to this notice, MBNA

> review[ed] its records to confirm that all of the account information that was being reported by Experian matched MBNA's records. MBNA also reviewed the account notes to determine if any dispute submitted by Gorman concerning the account had been resolved in his favor. Since the reported information matched the information in

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It is the duty of the CRA—not the furnisher—to ensure that the furnisher has all relevant information about the dispute. *See* § 1681i(a)(2)(A) (the CRA's notice to furnisher "shall include all relevant information regarding the dispute that the agency has received from the consumer. . . .") Moreover, as it is not hard to see why the CRAs interpreted Gorman's messages as they did, MBNA likely would have interpreted them in the same way had it obtained them, and so would have made the same, limited investigation.

[13] This is likely referring to the Truth in Lending Act, Pub. L. No. 90-321, Title I, 82 Stat. 146 (1968) (codified at 15 U.S.C. § 1601 *et seq.*)

> MBNA's records, and because the prior investigation of the charge with Four Peaks Entertainment had not been resolved in favor of Gorman, MBNA verified all the information that it had reported about the account as accurate.

Unlike the other three notices of dispute, the December 2004 notice contained enough information to alert MBNA to the specific nature of Gorman's actual claim: the reported debt was not owed because he had not received the goods he was promised. Simply verifying that the basic reported account data matched MBNA's internal records may not have been a reasonably sufficient investigation of this particular dispute.

But MBNA's investigation was more thorough than simply a review of bare account data. The review of internal records revealed that MBNA had previously investigated the Four Peaks charge and that the dispute had not been resolved in Gorman's favor.

Nevertheless, Gorman claims that a jury could still find MBNA's efforts unreasonable, because it failed to *re*investigate the dispute. As an initial matter, there is no evidence that MBNA's original investigation of the Four Peaks incident was deficient or unreliable.[14] MBNA contacted both Gorman and

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[14] The reasonableness of MBNA's initial investigation is not directly before us. That investigation was conducted before

(Continued on following page)

Four Peaks several times as part of the investigation. Its requests that Gorman provide more information were met with refusals to supply additional information or no response at all. MBNA's correspondence with Four Peaks also evidences a diligent attempt to ascertain the validity of the charges. For example, MBNA asked about Goman's opportunity to return the merchandise and was told that Gorman received shipping labels to return the merchandise.

Importantly, the CRA notice of dispute that triggered MBNA's duty to investigate did not identify any reason to doubt the veracity of the initial investigation. Furthermore, the notice of dispute did not provide any new information that would have prompted MBNA to supplement the initial investigation with any additional procedures or inquiries.

We agree that "[w]hether a reinvestigation conducted by a furnisher in response to a consumer's notice of dispute is reasonable . . . depends in large part on . . . the allegations provided to the furnisher by the credit reporting agency." *Krajewski v. Am. Honda Fin. Corp.*, 557 F. Supp. 2d 596, 610 (E.D. Pa. 2008). Without any indication in the allegations that the initial investigation lacked reliability or that new

MBNA reported Gorman's account to the CRAs. To the extent that it is governed by the FCRA at all, it falls under § 1681s-2(a)(1), the duty of furnishers to provide accurate information to CRAs. Although MBNA is required under § 1681s-2(a)(1) to provide accurate information, Gorman cannot enforce that obligation in a private cause of action. *See* § 1681s-2(c), (d).

information was available to discover, MBNA's decision not to repeat a previously-conducted investigation cannot have been unreasonable. Congress could not have intended to place a burden on furnishers continually to reinvestigate a particular transaction, without any new information or other reason to doubt the result of the earlier investigation, every time the consumer disputes again the transaction with a CRA because the investigation was not resolved in his favor. Thus, although reliance on a prior investigation *can* be unreasonable, *cf. Bruce v. First U.S.A. Bank, Nat'l Ass'n*, 103 F. Supp. 2d 1135, 1143-44 (E.D. Mo. 2000) (concluding that a furnisher's investigation was not necessarily reasonable when an initial investigation was deficient for, among other reasons, failing to contact the consumer), that was not the case here.

Gorman disputes this conclusion, insisting that under the Fourth Circuit's opinion in *Johnson*, it is per se unreasonable for a furnisher to rely solely on internal account records when investigating a consumer dispute. Gorman misreads *Johnson*, which recognized that the reasonableness of an investigation depends on the facts of the particular case, most importantly the CRA's description of the dispute in its notice. *See Johnson*, 357 F.3d at 431 (noting that confining the investigation to internal computer notes was not necessarily reasonable *in light of* the specificity of the description of the dispute in the notice).

In *Johnson*, the CRA's notice to MBNA read: "CONSUMER STATES BELONGS TO HUSBAND ONLY;" "WAS NEVER A SIGNER ON ACCOUNT. WAS AN AUTHORIZED USER." *Id.* at 429. The underlying facts were that Johnson's future husband opened an MBNA credit card account. Some years later, after they were married, Johnson's husband filed for bankruptcy, and MBNA told Johnson she was responsible for the balance, maintaining that she was a co-applicant, and therefore a co-obligor, on the account. *Johnson*, 357 F.3d at 428-29. Johnson argued that she was merely an authorized user. *Id.*

In response to the notice to the CRAs, MBNA only confirmed Johnson's identifying information and confirmed that its internal computer system indicated she was the sole responsible party on the account. *Id.* at 431. At no time did MBNA try to ascertain whether Johnson's information—that she had not signed the application form—was correct. The Fourth Circuit held this investigation unreasonable:

> The MBNA agents also testified that, in investigating consumer disputes generally, they do not look beyond the information contained in the CIS [MBNA's internal computer system] and never consult underlying documents such as account applications. Based on this evidence, a jury could reasonably conclude that MBNA acted unreasonably in failing to verify the accuracy of the information contained in the CIS.

Id.

In contrast to *Johnson*, in Gorman's case MBNA did review all the pertinent records in its possession, which revealed that an *initial* investigation had taken place in which MBNA contacted both Gorman and the merchant. Thus, unlike in *Johnson*, MBNA had—albeit earlier—gone outside its own records to investigate the allegations contained in the CRA notice, and on reading the notice, did consult the relevant information in its possession. *Johnson* does not indicate that a furnisher has an obligation to repeat an earlier investigation, the record of which is in the furnisher's records.

We emphasize that the requirement that furnishers investigate consumer disputes is procedural. An investigation is not necessarily unreasonable because it results in a substantive conclusion unfavorable to the consumer, even if that conclusion turns out to be inaccurate.

In short, although "reasonableness" is generally a question for a finder of fact, summary judgment in this case was appropriate.

3. MBNA's failure to provide notice of dispute

Gorman next argues that MBNA failed to notify the CRAs that he continued to dispute the delinquent charges on his account. He contends that in reporting the delinquency without also reporting his ongoing

dispute, MBNA violated its obligations under 12 C.F.R. § 226.13,[15] and thus furnished "incomplete or inaccurate" credit information in violation of the FCRA. MBNA neither concedes nor disputes that it was so obligated,[16] but argues on summary judgment that the statute does not permit Gorman to raise this claim. Also, in the alternative, MBNA contends that Gorman did not submit enough evidence to show whether his credit reports included a notice that the delinquency was disputed or whether MBNA did not so notify the CRAs. We must decide (1) whether the failure to notify the CRAs that the delinquent debt was disputed is actionable under § 1681s-2(b), and if so, (2) whether Gorman introduced sufficient evidence on summary judgment to show that MBNA so notified the CRAs.

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[15] This requirement is imposed by Regulation Z, promulgated pursuant to the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* The regulation provides that, if a consumer timely disputes a charge with a creditor but the creditor concludes that the charge is valid, the creditor "[m]ay not report that an amount or account is delinquent because the amount due . . . remains unpaid, if the creditor receives [within a specific time period] further written notice from the consumer that any portion of the billing error is still in dispute, unless the creditor also . . . [p]romptly reports that the amount or account is in dispute." 12 C.F.R. § 226.13(g)(4).

[16] Gorman does not bring a claim under either Regulation Z or the pertinent section of the Truth in Lending Act. We therefore need not decide whether in this case MBNA violated its obligations under those provisions.

a. Gorman's Claim is Actionable

If a consumer disputes the accuracy of credit information, the FCRA requires furnishers to report that fact when reporting the disputed information. Section 1681s-2(a)(3) provides: "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer." As noted, however, the statute expressly provides that a claim for violation of this requirement can be pursued only by federal or state officials, and not by a private party. § 1681s-2(c)(1) ("Except [for circumstances not relevant here], sections 1681n and 1681o of this title [providing private right of action for willful and negligent violations] do not apply to any violation of . . . subsection (a) of this section, including any regulations issued thereunder."); *see also Nelson*, 282 F.3d at 1059. Thus, Gorman has no private right of action under § 1681s-2(a)(3) to proceed against MBNA for its initial failure to notify the CRAs that he disputed the Four Peaks charges.

Gorman does have a private right of action, however, to challenge MBNA's subsequent failure to so notify the CRAs after receiving notice of Gorman's dispute under § 1681s-2(b). In addition to requiring that a furnisher conduct a reasonable investigation of a consumer dispute, § 1681s-2(b) also requires a creditor, upon receiving notice of such dispute, to both

report the results of the investigation *and*, "if the investigation finds that the information is incomplete or inaccurate, report those results" to the CRAs. § 1681s-2(b)(1)(C), (D). Gorman argues that MBNA's reporting of the Four Peaks charge and delinquency, without a notation that the debt was disputed, was an "incomplete or inaccurate" entry on his credit file that MBNA failed to correct after its investigation. As this claim alleges that obligations imposed under § 1681s-2(b) were violated, it is available to private individuals.

The Fourth Circuit has recently held that after receiving notice of dispute, a furnisher's decision to continue reporting a disputed debt without any notation of the dispute presents a cognizable claim under § 1681s-2(b). *See Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 150 (4th Cir. 2008). In *Saunders*, a consumer alleged that he incurred late fees and penalties as a result of a creditor's own admitted accounting errors; the creditor, Branch Banking & Trust (BB&T), refused to waive the fees, and the consumer responded by withholding payments on the loan. *Id.* at 145-46. BB&T reported the loan to the CRAs as "in repossession status," and, after suffering adverse credit decisions, the consumer contacted the CRAs to report the dispute. *Id.* at 146. The CRAs sent a notice of dispute to BB&T, triggering its obligations to investigate and verify the accuracy of the reported information under § 1681s-2(b)(1). BB&T responded by updating the consumer record to reflect that it had written off the debt as

uncollectible, but failed to indicate that the consumer still disputed the validity of the obligation. *Id.* The consumer brought suit under § 1681s-2(b) and a jury found that BB&T had violated its obligations.

The Fourth Circuit affirmed. The court reasoned that in enacting § 1681s-2(b)(1)(D), "Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading." *Id.* at 148. Although the report may have been "technically accurate" in the sense that it reflected the consumer's failure to make any payments on the loan, the court noted that it had previously held that "a consumer report that contains technically accurate information may be deemed 'inaccurate' if the statement is presented in such a way that it creates a misleading impression." *Id.* (citing *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 415-16 (4th Cir. 2001)). The Fourth Circuit went on to note that a consumer's failure to pay a debt that is not really due "does not reflect financial irresponsibility," and thus the omission of the disputed nature of a debt could render the information sufficiently misleading so as to be "incomplete or inaccurate" within the meaning of the statute. *Id.* at 150. *Saunders* went on to reject the contention that Congress meant to exempt furnishers of information from private liability by placing the initial obligation to report disputes in subsection (a), stating that "[n]o court has ever suggested that a furnisher can excuse its failure to identify an

inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have *already* reported the information accurately under § 1681s-2(a)." *Id.* at 149-50.

This reasoning is persuasive. Like *Saunders*, several other courts have held that a credit entry can be "incomplete or inaccurate" within the meaning of the FCRA "because it is patently incorrect, or because it is misleading in such a way and to such an extent that it can be expected to adversely affect credit decisions." *Sepulvado v. CSC Credit Servs., Inc.*, 158 F.3d 890, 895 (5th Cir. 1998); *see also Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 40 (D.C. Cir. 1984) ("Certainly reports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer. . . ."). As the Fourth Circuit observed, holding otherwise would create a rule that, as a matter of law, an omission of the disputed nature of a debt never renders a report incomplete or inaccurate. *See Saunders*, 526 F.3d at 150. Not only might such a rule intimidate consumers into giving up bona fide disputes by paying debts not actually due to avoid damage to their credit ratings, but it also contravenes the purpose of the FCRA, to protect against "unfair credit reporting methods." *See* 15 U.S.C. § 1681(a)(1).

Holding that there is a private cause of action under § 1681s-2(b) does not mean that a furnisher could be held liable on the merits simply for a failure to report that a debt is disputed. The consumer must

still convince the finder of fact that the omission of the dispute was "misleading in such a way and to such an extent that [it] can be expected to have an adverse effect." *Saunders*, 526 F.3d at 150 (quotation omitted). In other words, a furnisher does not report "incomplete or inaccurate" information within the meaning of § 1681s-2(b) simply by failing to report a meritless dispute, because reporting an actual debt without noting that it is disputed is unlikely to be materially misleading. It is the failure to report a bona fide dispute, a dispute that could materially alter how the reported debt is understood, that gives rise to a furnisher's liability under § 1681s-2(b). *Cf. id.* at 151 ("[W]e assume, without deciding that a furnisher incurs liability under § 1681s-2(b) only if it fails to report a meritorious dispute.").

It is true, as we have said, that a furnisher's initial failure to comply with this requirement is not privately enforceable. But as the Fourth Circuit noted, this does not excuse the furnisher's failure to correct the omission after investigating pursuant to § 1681s-2(b). *See Saunders*, 526 F.3d at 150. The purpose of § 1681s-2(b) is to require furnishers to investigate and verify that they are in fact reporting complete and accurate information to the CRAs after a consumer has objected to the information in his file. *See Johnson*, 357 F.3d at 431 ("[Congress] create[d] a system intended to give consumers a means to dispute—and, ultimately, correct—inaccurate information on their credit reports."). A disputed credit file that lacks a notation of dispute may well be

"incomplete or inaccurate" within the meaning of the FCRA, and the furnisher has a privately enforceable obligation to correct the information after notice. § 1681s-2(b)(1)(D). We thus conclude that the statute permits Gorman to bring his claim regarding MBNA's failure to report the charge still disputed.

b. Evidentiary Challenges

MBNA argues that summary judgment is nevertheless appropriate on this claim because Gorman failed to introduce sufficient admissible evidence that (1) his credit reports lacked a notation that the Four Peaks debt was disputed and (2) MBNA failed to report the account as disputed in this respect to the CRAs.

Gorman did not submit his credit reports to the district court until after the court issued its summary judgment order.[17] We ordinarily will not consider on appeal "[p]apers submitted to the district court *after* the ruling that is challenged." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). We need not decide, however, whether the credit reports are properly before us, because Gorman has submitted other admissible evidence that creates a triable issue of fact as to whether his credit reports lacked a notice of dispute.

[17] Gorman submitted the credit reports in support of his motion for leave to file a motion for reconsideration.

Gorman previously stated in his declaration that he had reviewed many of his personal credit reports, and that none of them included a notice that he disputed the delinquent charges. This statement is admissible evidence. Gorman has personal knowledge, having seen the reports. The evidence is not inadmissible hearsay, as Gorman does not rely on the credit reports for the truth of the matter asserted therein; in fact, as he notes, he disputes the truth of their contents. Instead, Gorman offers them to prove that no statement noticing the dispute was made. "If the significance of an offered statement lies solely in the fact that it was made . . . the statement is not hearsay." *United States v. Dorsey*, 418 F.3d 1038, 1044 (9th Cir. 2005) (quoting Fed. R. Evid. 801 advisory committee's note). He thus submitted sufficient evidence for a jury to conclude that his credit reports contained no notice of dispute.

There is also sufficient evidence from which a jury could infer that MBNA did not notify the CRAs that the debt was disputed. Gorman himself has no personal knowledge of what MBNA actually submitted to the CRAs in response to its investigations.[15] However, the dispute verification forms MBNA

[15] The only evidence he submitted was his sworn declaration that MBNA "report[ed] my account as delinquent *without indicating that some or all of the debt was disputed by the account holder*." Gorman Decl. ¶ 12, Apr. 12, 2006. But Gorman provided no indication that he had personal knowledge of the contents of MBNA's report.

returned to the CRAs contained no notice that the debt was disputed; rather, they indicated that the information previously provided was "accurate as reported." Yet, MBNA's review of Gorman's account notes revealed that he continued to dispute the debt even after MBNA concluded its initial investigation and reposted the Four Peaks charges. Moreover, according to MBNA's witness's declaration, MBNA told the CRAs that all of the information reported on Gorman's account was accurate, and Gorman has produced sufficient evidence that no notice of dispute appeared on the credit reports. Gorman has thus submitted sufficient evidence to create an issue of fact concerning whether MBNA failed to inform the CRAs, in response to the dispute notice, that Gorman still disputed the debt.

In sum, we hold that any investigation under § 1681s-2(b)(1)(A) must be reasonable; that any reasonable trier of fact would conclude that MBNA's investigation was reasonable; that § 1681s-2(b) permits Gorman to bring his claim that MBNA failed to inform the CRAs that the information about his delinquency was "incomplete or inaccurate" after investigating the December 2004 notice from the CRAs; and that Gorman has submitted sufficient evidence to survive summary judgment on this claim.[9]

[9] Because the district court held that there was no private right of action under § 1681s-2(b), it did not reach the merits of

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B. Libel Claim

Gorman also advanced a state law libel claim on which the district court made two rulings. On MBNA's motion to dismiss, the court held that the FCRA did not preempt Gorman's libel claim because he alleged malice or willful intent to injure, satisfying the requirements of § 1681h(e). *Gorman I*, 370 F. Supp. 2d at 1009-10. MBNA contests this conclusion. The district court granted MBNA's motion for summary judgment on the libel claim however, holding that Gorman failed to submit evidence creating a disputed issue of material fact with respect to malice or willful intent. *Gorman II*, 435 F. Supp. 2d at 1009-10. Gorman appeals this ruling.

1. Preemption

The preemption question presents a difficult issue of first impression. The difficulty arises from the interaction of two provisions of the FCRA. Section 1681h governs the "[c]onditions and form of disclosure to consumers," disclosures that CRAs are

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Gorman's claim *Gorman II*, 435 F. Supp. 2d at 1008-09. On appeal, MBNA's arguments as to this claim are only that there is no private right of action, and, in the alternative, that Gorman has failed to introduce admissible evidence that MBNA failed to report the debt as disputed. We do not go beyond the arguments made, and so conclude only that Gorman can go forward with his claim, having produced admissible evidence that MBNA failed to report the debt as disputed. We take no position as to whether MBNA's failure to report the debt as disputed violated § 1681s-2(b).

required or permitted to make under other sections of the Act. Section 1681h(e) sets forth, in relevant part, the following "[l]imitation of liability" (with emphasis added):

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g,[20] 1681h,[21] or 1681m[22] of this title or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report *except as to*

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[20] Section 1681g addresses "[d]isclosures to consumers." It provides in detail the information CRAs must disclose to consumers, the rights of consumers to obtain credit reports and scores and to dispute information in credit reports, and the information that must be made available to identity theft victims and mortgage applicants.

[21] Section 1681h, as noted above, deals with the "[c]onditions and form" of these disclosures.

[22] Section 1681m addresses the duties of "users of consumer reports." In essence, it imposes certain responsibilities on persons who take adverse actions based on credit reports or another source of information about a person's credit, or who make solicitations on the basis of credit reports.

> *false information furnished with malice or willful intent to injure such consumer*[.]

Section 1681t addresses more generally the FCRA's "[r]elation to State laws." In general, the FCRA does not preempt any state law "except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency." § 1681t(a). But this general rule has several exceptions, added in 1996, including the following:

> No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply –
>
> (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
>
> (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).

§ 1681t(b)(1)(F).[23] No changes were made to § 1681h(e) with these amendments.

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[23] The parties assume that, if § 1681t(b)(1)(F) applies, it bars Gorman's libel claim. We note, however, that the

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Although § 1681t(b)(1)(F) appears to preempt all state law claims based on a creditor's responsibilities under § 1681s-2, § 1681h(e) suggests that defamation claims can proceed against creditors as long as the plaintiff alleges falsity and malice. Attempting to reconcile the two sections has left district courts in disarray. The district court in this case held that § 1681h(e), the more specific preemption provision, trumped the more general preemption provision of § 1681t(b)(1)(F).[24] *Gorman I*, 370 F. Supp. 2d at

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application of that section to any given common law claim is not self-evident. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court discussed whether a preemption provision containing the same "No requirement or prohibition . . . shall be imposed" language applied to some, but not all, common law claims. A plurality of the Court analyzed the question as follows: "we ask whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." *Id.* at 523-24 (alterations in original). *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying a " 'presumption against the pre-emption of state police power regulations' to support a narrow interpretation of such an express [statutory] command"). Assuming this is the right inquiry, libel law probably entails a "prohibition . . . with respect to" what a furnisher of information can report to a CRA. We do not decide the question, however, given our conclusion that Gorman has not presented sufficient evidence to state a libel claim.

[24] We note that both provisions are specific in different ways: § 1681t(b)(1)(F) is specific as to the target of suits, governing requirements placed on furnishers of information; § 1681h(e) is specific as to the nature of the claim, permitting certain common law claims if falsity and malice is shown. So, in

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1009-10 (citing *Gordon v. Greenpoint Credit*, 266 F.Supp. 2d 1007, 1013 (S.D. Iowa 2003)). Other district courts have followed different approaches. Some have concluded that the later-enacted § 1681t(b)(1)(F) effectively repeals the earlier preemption provision, § 1681h(e). *Jaramillo v. Experian Info. Solutions, Inc.*, 155 F.Supp 2d 356, 361 (E.D. Pa. 2001) (footnote omitted) (the "total preemption" approach). Attempting to give meaning to both sections, other courts have observed that § 1681t(b)(1)(F) relates to "any subject matter regulated under section 1681s-2," the section which regulates the responses of furnishers to notices of dispute. Hence, these courts apply a "temporal approach," holding that "causes of action predicated on acts that occurred *before* a furnisher of information had notice of any inaccuracies are not preempted by § 1681t(b)(1)(F), but are instead governed by § 1681h(e)." *Kane v. Guar. Residential Lending, Inc.*, 2005 WL 1153623, at *8 (E.D.N.Y. May 16, 2005).

Gorman advocates a still different "statutory" analysis, under which "t(b)(1)(F) preempts only state law claims against credit information furnishers brought under state statutes, just as 1681h(e) preempts only state tort claims." *Manno v. Am. Gen. Fin. Co.*, 439 F.Supp. 2d 418, 425 (E.D. Pa. 2006)

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some sense, both provisions are "specific." But § 1681h(e) may be more specific for preemption purposes, because the tension is the nature of the claims preempted, and § 1681h(e) specifies certain claims that can be brought.

(describing the approach).[25] Finally, MBNA argues that § 1681h(e) is not a broad preemption provision at all, but simply a "grant of protection for statutorily required disclosures." (quoting *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 814 (W.D. Ky. 1999)). But, of course, granting entities immunity from state law tort suits in exchange for making required disclosures is just another way of saying that certain state law claims are preempted.[26]

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[25] Support for this view rests on the proposition that "Congress seems to have been most concerned with protecting credit information furnishers from state statutory obligations inconsistent with their duties under the FCRA." *Manno*, 439 F. Supp. 2d at 425. Section 1681t(b)(1)(F) exempts two specific state statutes from preemption, suggesting, some courts say, that Congress "had state statutes in mind." *Id.* Other subsections of § 1681t also exempt state statutes; none addresses common law claims. Yet, this distinction does not appear in the text of the statute. In fact, "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of commonlaw rules." *Cipollone*, 505 U.S. at 521 (1992) (plurality opinion) (second alteration in original); *see also Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (adopting this position for a majority of the Court).

[26] *McAnly* offers one reason why Congress may have chosen to preempt such state law claims:

> Since various parts of the federal statute require consumer reporting agencies and information users to disclose information to consumers under certain circumstances, this section guarantees that the agencies or users cannot be sued for those required disclosures under state tort law. It makes sense that acts required

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In the end, we need not decide this issue. As we conclude below, even if Gorman could bring a state law libel claim under § 1681h(e), and such a claim were not preempted by § 1681t(b)(1)(F), he has not introduced sufficient evidence to survive summary judgment on this claim.

2. Evidence

Under California law, "[l]ibel is a false and unprivileged publication . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code § 45. Even if Gorman's libel claim is not preempted by § 1681t(b)(1)(F), it is still subject to § 1681h(e), and so he must prove, in addition to the common law elements of libel, that the information was "false" and "furnished with malice or willful intent to injure."

The FCRA does not define the appropriate standard for "malice." The two circuits that have interpreted § 1681h(e) have applied the standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), requiring the publication be made

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to be done by the FCRA are immunized from state tort liability.

77 F. Supp. 2d at 814-15. However illuminating this explanation may be, it does not help resolve the apparent conflict between §§ 1681h(e) and 1681t(b)(1)(F).

"with knowledge that it was false or with reckless disregard of whether it was false or not." *See Morris v. Equifax Info. Servs., LLC*, 457 F.3d 460, 471 (5th Cir. 2006); *Thornton v. Equifax, Inc.*, 619 F.2d 700, 705 (8th Cir. 1980). Under *New York Times*, to show "reckless disregard," a plaintiff must put forth "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Morris*, 457 F.3d at 471 (applying *St. Amant*). We agree with the courts that have adopted the *New York Times* standard for purposes of § 1681h(e), and so apply it here.

Gorman's libel claim is based on two pieces of information reported by MBNA: the underlying debt itself and the reporting of the debt without a notation that it was disputed.

As to the debt itself, there is no evidence that MBNA knew the debt was false or acted with reckless disregard as to its falsity. As an initial matter, the bulk of the delinquent debt—about $5,000—derives from non-disputed credit card purchases, unrelated to the disputed Four Peaks charge. Gorman contends that he does not owe these charges, claiming an offset for his attorneys' fees incurred in the dispute over the Four Peaks debt. But he has presented no authority whatever supporting his entitlement to these fees, nor any evidence that these fees are reasonable. Absent any evidence or colorable argument that this portion of the debt to MBNA was invalid, no reasonable jury could find that MBNA acted

maliciously in reporting this portion of the debt to the CRAs.

Gorman has also failed to introduce sufficient evidence of malice with respect to the remaining portion of the debt, the roughly $750 disputed Four Peaks charge. Even assuming that the debt was indeed invalid, we cannot say that a reasonable jury could conclude that MBNA acted with "reckless disregard" as to the invalidity of the debt.[7]

MBNA conducted an investigation into Gorman's dispute in which it contacted both Gorman and Four Peaks. As a result of the investigation, it initially agreed to remove the charges, reinstating them only after learning that Gorman had failed to return the merchandise. The remaining controversy involves a legal and factual disagreement between Gorman and Four Peaks.[8] MBNA did not act recklessly by failing

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[7] We do not decide whether the debt related to the Four Peaks charge is valid, as the question is not before us.

[8] Gorman's essential claim is that in rejecting the goods and making them available to Four Peaks for pickup, he has done all that is required under California law. *See* Cal. Com. Code § 2602 ("If the buyer has before rejection taken physical possession of the goods . . . he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them."). Four Peaks claimed to have sent Gorman pre-paid shipping labels for the defective merchandise's return, but insisted that Gorman would have to pay to return the replacement equipment it claims to have sent. Gorman insists that he did not receive any replacement merchandise or shipment labels and, in any event, he refuses to pay any shipping costs.

to wade through this complex legal and factual debate. *See Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1069 (9th Cir. 1992) (concluding that a furnisher does not act with malice when it takes "reasonable steps to verify the information" in its credit report). That it reposted the debt in reliance on Four Peaks's version rather than resolving the dispute in Gorman's favor does not demonstrate that MBNA "entertained serious doubts as to the truth of [its] publication." *St. Amant*, 390 U.S. at 731.

Additionally, even if MBNA violated its obligations to report that Gorman disputed the debt, this failure does not render the information that was reported "false" so as to support a libel claim meeting the § 1681h(e) malice standard. The obligation to report a disputed debt is a protective regulatory requirement imposed by the FCRA. § 1681s-2(a)(3); *see also* 12 C.F.R. § 226.13. Any failure by MBNA to meet this requirement may render its reporting deficient under the statute, but it does not render the information MBNA did furnish maliciously or wilfully false. So long as the creditor has a good faith reason for believing that the debt is in fact owed, reporting the debt without reporting the dispute does not convey "false" information "with malice or willful intent to injure the consumer." *See Francis v. Dun & Bradstreet, Inc.*, 4 Cal. Rptr. 2d 361, 364 (Ct. App. 1992) (holding that a defamation claim cannot be sustained for truthful information in a credit report, even if the information reported supports misleading inferences).

Gorman has offered no evidence that MBNA seriously doubted that the debt was owed, or that MBNA believed Gorman had a meritorious dispute. The record suggests instead that MBNA investigated the debt and determined that it was valid. Despite its conclusion, MBNA may still have faced a regulatory obligation to report the continuing dispute, but its failure to do so was not malicious.

Gorman's sole evidence of MBNA's malice or intent to injure is the statement in his declaration that an MBNA representative told him, during a collection call, "We're a big bank. You either pay us or we'll destroy your credit." But this incident does not evidence a knowledge on MBNA's part that the debt was not valid. In the context of other evidence in the record—including Gorman's refusal to pay *any* of his credit card bill because of supposed attorneys' fees owed him by MBNA—there is no basis for concluding that MBNA issued that threat knowing no debt was due or recklessly disregarding the invalidity of the debt.

As Gorman cannot state a claim for libel consistent with the *limited* exception contained in § 1681h(e) of the FCRA, we affirm the district court's grant of summary judgment to MBNA on Gorman's libel claim.

C. California Civil Code § 1785.25(a)

Finally, Gorman brings a claim under California Civil Code section 1785.25(a), which provides:

> A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate.

Section 1681t(b)(1)(F), the FCRA's preemption provision, expressly exempts *this subsection*—California Civil Code section 1785.25(a)—from its general exclusion of state law claims on matters governed by § 1681s-2.[29]

On MBNA's motion to dismiss, the district court nevertheless held the California statutory claim preempted, because the private right of action to enforce California Civil Code section 1785.25(a) is found in other sections not specifically exempted from the federal preemption provision, namely, California Civil

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[29] As noted above, § 1681t(b)(1)(F) provides:

> No requirement or prohibition may be imposed under the laws of any State . . . with respect to any subject matter regulated under . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply—
>
> (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
>
> (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996).

The Massachusetts statute sets forth procedures to ensure accuracy of information reported to consumer reporting agencies.

Code sections 1785.25(g)[30] and 1785.31.[31] Because these specific sections were not excluded from the preemption section of the FCRA, the district court concluded, violations of California Civil Code section 1785.25(a) could only be enforced by federal or state officials. *Gorman I*, 370 F. Supp. 2d at 1010-11.

We do not find the district court's reasoning persuasive. As an initial matter, the court did not cite any provision of California law authorizing enforcement of section 1785.25(a) by state officials. *Lin v. Universal Card Services Corp.*, 238 F. Supp. 2d 1147 (N.D. Cal. 2002), on which the district court relied, similarly fails to identify authorization for enforcement by state officials. Such authorization may reside elsewhere in California law, but if it does, it almost surely lies in provisions also not specifically excluded by the FCRA preemption provision. The district court's analysis would thus lead to the conclusion that Congress explicitly retained the portions of the California statutory scheme that create obligations,

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[30] Section 1785.25(g) provides:

> A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with those provisions.

[31] Section 1785.31 provides that "[a]ny consumer who suffers damages as a result of a violation of this title by any person may bring an action" to recover damages.

without leaving in place any enforcement mechanism. This would be an unlikely result at best.[32]

Moreover, the district court construed the statutory exception in isolation, disregarding the affirmative preemption language of the statute that "*[n]o requirement or prohibition* may be imposed" with respect to subjects regulated under § 1681s-2. (emphasis added). Neither California Civil Code section 1785.25(g) nor section 1785.31 imposes a "requirement or prohibition." Rather, these sections merely provide a vehicle for private parties to enforce other

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[32] In *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181 (D. Mass. 2006), the court examined the Massachusetts provision, Mass. Gen. Law 93 § 54A(a), that is also excluded from § 1681t(b)(1)(F). As with the California statute, the FCRA explicitly identifies the portion of the Massachusetts statute that creates the reporting obligations for furnishers, but does not expressly mention the section that provides for private enforcement. *Id.* at 185-86. The court held that absent any evidence that state officials were authorized to enforce this provision, the construction urged by the district court here could not stand: "it is absurd to conclude that Congress would have explicitly excepted [Mass. Gen. Law 93 § 54A(a)] while not leaving an enforcement mechanism." *Id.* at 189. Finding that the parties stipulated to the Attorney General's authority, however, *Islam* held the private state claim preempted. *Id.*

The *Islam* court also felt itself constrained by the First Circuit's affirmance of *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1 (D. Mass. 2004), *aff'd, Gibbs v. SLM Corp.*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005), which also construed § 1681t(b)(1)(F) as preempting private causes of action under the Massachusetts statute, and was summarily affirmed by the First Circuit without analysis. As we engage in more thorough statutory construction analysis, we reach a different conclusion.

sections, which *do* impose requirements and prohibitions. In other words, Congress had no need to include these enforcement provisions in the § 1681t(b)(1)(F) exception to save the California statutory scheme from preemption, because those provisions were not preempted by the affirmative language of the preemption provision. By the plain language of the statute, therefore, these sections are not preempted by § 1681t(b)(1)(F).

MBNA argues that this plain reading of the statute is foreclosed by the Supreme Court's decision in *Cipollone*. Interpreting the phrase "any requirement or prohibition" in the Federal Cigarette Label and Advertising Act, a majority of the *Cipollone* Court held that common law damages actions can impose "requirement[s] or prohibition[s]," because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." 505 U.S. at 521 (plurality opinion) (citation omitted).[33] But, as the court later made clear in a majority opinion relying on the *Cipollone* plurality's discussion on this point, it is not the common law *enforcement mechanisms* that are requirements or prohibitions, but the "common law *duties*" underlying

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[33] Although only a plurality of the Court signed onto the portion of the opinion containing this specific language, a majority of justices adopted the position that the language "requirement or prohibition" sweeps broadly enough to encompass state common-law rules. *See Cipollone*, 505 U.S. at 548-49 (Scalia and Thomas, JJ., concurring in the judgment in part and dissenting in part).

such actions. *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1008 (2008) (emphasis added). As *Riegel* went on to explain, again relying on the *Cipollone* plurality, "common-law liability is premised on the existence of a *legal duty*, and a tort judgment therefore establishes that a defendant has violated a state-law *obligation*." *Id.* (quoting *Cipollone*, 505 U.S. at 522) (emphasis added). Thus, a "requirement" is "a rule of law that must be obeyed," *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005), whether it arises from common law principles enforceable in damages actions or in a statute. But the damages remedy itself is not a "requirement or prohibition."

Here, it is California Civil Code section 1785.25(a), and only section 1785.25(a), that imposes legal duties —"rule[s] of law that must be obeyed"—on furnishers of information. Congress explicitly saved this section from preemption in the FCRA. Private enforcement of these obligations does not impose "requirement[s] or prohibition[s]" but, instead, provides enforcement mechanisms for "requirement[s] or prohibition[s]["] imposed separately. Sections 1785.25(g) and 1785.31 do not impose any additional standards "designed to be . . . potent method[s] of governing conduct and controlling policy," *Riegel*, 128 S.Ct. at 1008, nor do these sections require furnishers to obey any *additional* rules of law. The rules that must be obeyed already exist in the reporting obligations specified by section 1785.25(a) and saved in the FCRA. *See Bates*, 544 U.S. at 445.

MBNA's argument that Congress's desire for uniformity and consistency compels an alternative construction is also unpersuasive in this context. MBNA maintains that the FCRA preemption provision evidences a desire for uniform credit reporting obligations, and that the California statute was saved only because it was not inconsistent with obligations imposed by the federal statute. The legislative history surrounding § 1681t(b)(1)(F) is murky, but there is evidence that the statutory scheme, which establishes national requirements and preempts most state regulation, was motivated at least in part by a desire for uniformity of reporting obligations. *See* S. Rep. No. 103-209, at 7 (1993) ("Recognizing the national scope of the consumer reporting industry and the benefits of uniformity, the Committee bill includes provisions preempting state law in several key areas of the FCRA."). It is also true that the excepted state law provisions are largely consistent with obligations imposed in the FCRA; indeed, the requirements imposed in the California and Massachusetts laws appear, in nearly identical fashion, in § 1681s-2(a).[34]

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[34] *Compare* Cal. Civ. Code section 1785.25(a) ("A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate."), *and* Mass. Gen. Law 93 § 54A(a) ("Every person who furnishes information to a consumer reporting agency shall follow reasonable procedures to ensure that the information reported to a consumer reporting agency is accurate and complete. No person may provide information to a consumer

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But the difference between the California statute and the FCRA regarding remedies does not offend the purported goal of uniformity of credit reporting obligations. The enforcement sections do not impose inconsistent or conflicting obligations on furnishers of information; as we have noted, they impose *no* such requirements or prohibitions at all. As such, the enforcement provisions do not add to a patchwork of confusing obligations with which a furnisher must struggle to comply. They instead allow for additional avenues through which consumers can ensure that

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reporting agency if such person knows or has reasonable cause to believe such information is not accurate or complete."), *with* § 1681s-2(a)(1)(A) ("A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.").

As MBNA indicates, when the California exception was added in 1996, the relevant portion of the FCRA was worded differently. *See* 15 U.S.C. § 1681s-2(a)(1)(A) (1996) (prohibiting furnishing of information that furnisher "knows or consciously avoids knowing" is inaccurate). Congress later amended the FCRA to more closely track the language of the California statute. MBNA argues that it was originally reasonable for Congress expressly to exclude the California statute from preemption simply because it imposed broader, and potentially inconsistent, obligations on furnishers. Although this may be true, when Congress later amended the FCRA essentially to match the California statute, it did not then remove the California exception, as it could have done. The decision to retain the exception for California Civil Code section 1785.25(a) thus suggests that Congress likely intended to preserve the remaining unique provisions of the California scheme, including the private enforcement provisions.

furnishers are complying with the obligations Congress specifically meant to impose.

Moreover, exempting specific state statutes from preemption is very unusual in federal statutes. To suppose Congress would do so for little or no purpose—as would be the case if the private cause of action under California law were preempted—is simply not plausible. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) ("The saving clause assumes that there are some significant number of . . . cases to save.").

Because the plain language of the preemption provision does not apply to private rights of action, and because the likely purpose of the express exclusion was precisely to permit private enforcement of these provisions, we hold that the private right of action to enforce California Civil Code section 1785.25(a) is not preempted by the FCRA.[35]

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[35] On petition for rehearing en banc, MBNA raises for the first time an argument that allowing private enforcement of California Civil Code section 1785.25(a) is inconsistent with the purpose of the FCRA and thus is preempted under both FCRA § 1681t(a) and ordinary conflict preemption provisions. MBNA did not advance this contention before us initially, so the argument is waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Even if we were to entertain MBNA's conflict preemption argument, however, we would reject it for several reasons. First, a complete reading of the statutory language continues to convince us that Congress intended to except the California statute—including the private enforcement provisions—from

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preemption. As we note, the remedial provisions do not impose any "requirement[s] or prohibition[s]" on furnishers of information as those terms are ordinarily understood, and so the private enforcement provisions do not fall within the statute's express preemption provision. Even more importantly, the savings provision, § 1681t(b)(1)(F)(ii), provides that FCRA's preemption provisions do not apply "with respect to" California Civil Code section 1785.25(a). Unlike other state laws expressly saved by the exceptions to the express preemption provision, which, for example, state that the FCRA "shall not apply *to* any State law in effect on September 30, 1996," *see* § 1681t(b)(1)(E) (emphasis added), Congress used the broader "with respect to" language to refer to the California statute.

The most sensible understanding of this difference is that Congress intended for the exception to apply not only to the specific subsection mentioned in the statute, but also to California laws that operate "with respect to" that subsection, which would include the private enforcement sections. Where Congress saves a particular state law from preemption, it would be incoherent to hold that the state law is otherwise preempted because it was somehow "inconsistent" with an overarching congressional purpose.

Second, MBNA directs us to FCRA § 1681s(c) to support its contention that the FCRA preserves state law enforcement officials' powers to enforce California Civil Code section 1785.25(a).

Section 1681s(c) provides, in relevant part, "In addition to other remedies as are provided under State law, if the chief law enforcement officer of a State . . . has reason to believe that any person has violated or is violating this subchapter, the State [may bring actions to enjoin the violation and recover damages]."

We think this provision supports, rather than undermines, the position that the FCRA does not preempt private enforcement of the California statute. If anything, section 1681s(c) provides authorization for state officials to enforce violations of the *FCRA*, while at the same time *preserving* "other remedies as are provided under State law," including private enforcement

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D. Evidence of Causation/Damages

Finally, MBNA proposes an alternative ground on which to affirm all claims: that Gorman failed in the summary judgment proceedings to submit admissible evidence of causation or damages. In *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069-70 (9th Cir. 2008), this court found sufficient evidence of causation and damages to survive summary judgment where:

> Dennis [the plaintiff] testified that he hoped to start a business and that he diligently paid his bills on time for years so that he would have a clean credit history when he sought financing for the venture. The only blemish on his credit report in April 2003

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remedies for state law violations: Importantly, section 1681s(c) does not refer to "other remedies as are provided to chief law enforcement officers under State law." In other words, to the extent that Congress saved a state liability rule from preemption, it intended also to save "other remedies as are provided under State law" to enforce those liability rules.

Third, the available legislative history and administrative interpretation of the FCRA supports our holding concerning the scope of the FCRA preemption provisions. The Senate report concluded that "no State law would be preempted [by the FCRA] unless compliance would involve a violation of Federal law." S. Rep. No. 97-517, at 12 (1969). The Federal Trade Commission, charged with enforcing the FCRA, similarly understands the "basic rule" governing preemption under the FCRA: Section 1681t(a) preempts state law "only when compliance with inconsistent state law would result in a violation of the FCRA." 16 C.F.R. pt. 600 appx. § 622 ¶ 1. As we note, permitting private enforcement of state law obligations that are nearly identical to the FCRA's obligations would not require furnishers to violate the FCRA to comply with state law.

> was the erroneously reported judgment. According to Dennis, that was enough to cause several lenders to decline his applications for credit, dashing his hopes of starting a new business. Dennis also claims that Experian's error caused his next landlord to demand that Dennis pay a greater security deposit.

Here, Gorman submitted evidence that he was refused credit or offered higher than advertised interest rates; the explanations given by the creditors were delinquencies on his credit report; and the only delinquency is the MBNA account. Gorman maintains that he had to borrow money at inflated interest rates, and that he lost wages from the time spent dealing with his credit problems. Under *Dennis*, this is sufficient to establish causation and damages.

III. CONCLUSION

For the foregoing reasons, we AFFIRM in part and REVERSE in part the district court's order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

John Gorman,

Plaintiff,

v.

Wolpoff & Abramson, LLP, et al.,

Defendants. /

NO. C 04-04507 JW

ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

(Filed Aug. 23, 2006)

Plaintiff John Gorman has filed a motion seeking leave to file a motion for reconsideration of the Court's June 23, 2006 Order granting Defendant MBNA's motion for summary judgment. Having considered the arguments advanced by Plaintiff, the Court DENIES Plaintiff's motion for leave to file a motion for consideration [sic].

Dated: August 23, 2006

/s/ James Ware
JAMES WARE
United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

John Gorman,

Plaintiff,

v.

Wolpoff & Abramson, LLP, et al.,

Defendants.

/

NO. C 04-04507 JW

ORDER GRANTING DEFENDANT MBNA'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT WOLPOFF & ABRAMSON'S MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT WOLPOFF & ABRAMSON'S REQUEST FOR FINDING OF BAD FAITH; SETTING HEARING ON ORDER TO SHOW CAUSE RE: RULE 11 SANCTIONS

I. INTRODUCTION

John Gorman ("Gorman" or "Plaintiff") alleges libel and violations of various state and federal fair credit reporting and debt collection statutes against MBNA and MBNA's attorney, Wolpoff & Abramson, ("Wolpoff," collectively "Defendants"). MBNA and Wolpoff each filed a Motion for Summary Judgment. On June 5, 2005, the Court held a hearing on Defendants' Motions. Based on the papers filed to

date and the statements of counsel at the hearing, the MBNA's Motion for Summary Judgment is GRANTED, Wolpoff's Motion for Summary Judgment is GRANTED and Request for Finding of Bad Faith is DENIED.

II. BACKGROUND

Gorman is an attorney and a former holder of a MBNA Visa credit card. (Second Amended Complaint, Docket Item No. 41, "SAC" at ¶¶ 1, 4.) "In or about January and February 2003," Gorman disputed the legitimacy of credit card charges from "Four Peaks Entertainment" ("Four Peaks") that were posted to his account. (SAC ¶¶ 7, 8.) According to Gorman, Four Peaks shipped defective equipment that could not be successfully installed, and a Four Peaks installer damaged Gorman's roof. (SAC ¶ 7). Upon receiving written notification from Gorman, MBNA temporarily removed the charges, but later reposted them and refused to remove them again. (SAC ¶ 8.) MBNA retained Wolpoff & Abramson, a law firm that handles debt collection cases, to initiate legal action against Gorman. (SAC ¶¶ 2, 9.) According to the SAC, MBNA and Wolpoff placed "at least several hundred telephone calls" to Gorman regarding his alleged debt. (SAC ¶ 10.) Gorman provides a single example of receiving multiple telephone calls during a dinner party at his residence on August 14, 2003 where he asked the caller to cease calling, but the calls continued. (SAC ¶ 10.)

In Spring of 2004, Gorman discovered that MBNA "falsely reported" to various credit reporting agencies that he was delinquent on his obligations to MBNA, without reporting that the debt was "disputed." (SAC ¶¶ 11, 12.) Gorman alleges that on May 6, 2004, he notified Equifax, Trans Union, and Experian (collectively, "CRAs") in writing that the information provided by MBNA was mistaken. (SAC ¶ 12.) The CRAs subsequently informed him that MBNA would not make any changes or corrections, and MBNA did not inform the CRAs that the alleged debt was disputed. (SAC ¶ 12.) Gorman also alleges that he wrote to MBNA on September 15, 2004, requesting that it correct the information, but MBNA did not take any corrective action. (SAC ¶ 12.)

On May 4, 2005, the Court dismissed Gorman's First Amended Complaint, but granted leave to amend as to particular allegations. The SAC alleges causes of action for libel and violations of the Fair Credit Reporting Act ("FCRA") 15 U.S.C. §§ 1681n, 1681o against Defendant MBNA. The SAC also contains a cause of action for violations of the Fair Debt Collection Practices Act ("FDCPA") §§ 1692c, 1692d against Defendant Wolpoff. MBNA and Wolpoff each move for summary judgment.

III. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-324 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. If this burden is met, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element with respect to which the non-moving party bears the burden of proof at trial. *Id.* at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical

doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588; *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv.*, 809 F.2d at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

A. FCRA Claims

Because there is no private right of action under § 1681s-2(a), *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002), Gorman's

§ 1681n and § 1681o claims survive summary judgment only if Gorman can base them on willful and negligent violations of § 1681s-2(b). *See Gorman v. Wolpoff & Abramson*, 370 F. Supp. 2d 1005, 1012 (citing *Nelson*). Unlike § 1681s-2(a) which imposes a "duty of furnishers of information to provide accurate information," § 1681s-2(b) is directed to the "duties of furnishers of information upon notice of dispute." In relevant part, § 1681s-2(b) provides:

> After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—
>
> (A) conduct an investigation with respect to the disputed information;
>
> (B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;
>
> (C) report the results of the investigation to the consumer reporting agency;
>
> (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis; and
>
> (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any

> reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—
>
> (i) modify that item of information;
>
> (ii) delete that item of information; or
>
> (iii) permanently block the reporting of that item of information.

The SAC contains a conclusory allegation that "[o]n information and belief, MBNA . . . [was] notified by the various credit reporting agencies of the existence of plaintiff's dispute yet failed to conduct a complete and sufficient investigation." (SAC ¶ 12.)

The record indicates MBNA conducted an investigation of the initial Four Peaks charge, (Decl. of Kristin Lepley in Support of Mot. for Summ. J. by Def. MBNA, Docket Item No. 53 ("Lepley Decl.") at ¶ 5-15), as well of each of Gorman's four disputes received from the CRAs (Lepley Decl. ¶ 17-20.) MBNA received a customer dispute form from TransUnion dated May 13, 2004 regarding Gorman's account which read "Claims company will change. Verify all account information." (Lepley Decl., Exh. 2.) By declaration, Ms. Lepley, a compliance officer in the customer assistance department of MBNA (Lepley Decl. ¶ 1), stated that MBNA reviewed its account notes for Gorman's account and determined that MBNA had not agreed to delete any charges or to modify the account information in any way. MBNA found that there were some minor differences such as

birthdate and address information between MBNA and TransUnion's records, and MBNA submitted this information to TransUnion along with additional delinquency information concerning Gorman's account. (Lepley Decl. ¶ 17.) MBNA received three other customer dispute forms: (1) from Experian, dated May 18, 2004, stating: "Customer claims account take over, fraudulent charges made on account. Verify signature provide complete ID." (Lepley Decl., Exh. 3.), (2) from Experian, dated December 20, 2004, stating: "Claims inaccurate information. Did not provide specific dispute. Provide complete ID and verify account information" and under "FRCA Relevant Information" reads: "Promised goods/services not delivered. I timely disputed the charges under the TIL Act," and (3) from TransUnion, dated November 29, 2005, stating "Disputes present/previous Account Status History," and "Customer claims account takeover fraudulent charges made on account," was also investigated in a similar manner. (Exh. 3-5.) MBNA's investigation as to each of these customer dispute forms was similar to the investigation conducted upon receipt of the May 13, 2004 TransUnion dispute form. (Lepley Decl. ¶¶ 18-20.)

Based on the content of the these customer dispute forms from the CRAs and Ms. Lepley's description of the MBNA's subsequent investigations, Gorman, as the party that bears the burden of proof as to a § 1681s-2(b) violation, must raise a genuine issue of material fact that MBNA's investigation was not reasonable.

Gorman primarily alleges that the error that MBNA reported to the CRAs was that the charges were not marked disputed when reported. As an initial matter, Gorman has not presented any evidence in the record, beyond his belief at deposition, that MBNA did not report the account as disputed. Such a lack of evidence alone could be sufficient to find that Gorman has not raised a genuine issue of material fact as to this claim against MBNA. Assuming arguendo that MBNA failed to report the account as disputed to the credit agencies, such a violation of § 1681s-2(a) is not before this Court. Gorman must raise a genuine issue of material fact as to the reasonableness of MBNA's investigation under § 1681s-2(b).

At his deposition, Gorman maintains that MBNA's investigation was unreasonable because (1) MBNA did not resolve the dispute in his favor, and (2) MBNA did not contact him with respect to the disputed charges. As to Gorman's first objection, Gorman places the boat before the tug—the reasonableness of the investigation address the procedures of the investigation and is not an assessment of the outcome. If Gorman is also arguing that his belief that his dispute was bona fide should have been self-evident to anyone reviewing the record, and thus the investigation was unreasonable, such an argument is similarly circular.

As to Gorman's second argument that MBNA's investigation was unreasonable because MBNA did not contact him regarding the disputed charges, this Court is persuaded by the reasoning in the Seventh

Circuit that a furnisher of credit information need not contact a debtor who disputes a debt. *Westra v. Credit Control of Pinellas,* 409 F.3d 825, 827 (7th Cir. 2005) ("requiring a furnisher to automatically contact every consumer who disputes a debt would be terribly inefficient and such action is not mandated by the FCRA"). Furthermore, it is also unclear what further information Gorman could have provided MBNA beyond the information in his letter to MBNA dated August 7, 2003. (*See* Narita Decl., Exh. A, Gorman Depo., 107:12-121:16.)

Although reasonableness is ordinarily an issue for the trier of fact, Gorman must raise "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Because both of Gorman's objections are insufficient as a matter of law to raise genuine issues of material fact, and Gorman has not raised any other objections to the reasonableness of MBNA's investigation, summary judgment on the FCRA claim is granted in favor of MBNA.

B. State Law Libel Claims

As the Court stated in the Order Granting Motions to Dismiss (Docket Item No. 37), regulation of MBNA's responsibilities as a furnisher of information to credit reporting agencies is generally preempted by 15 U.S.C. § 1681t(b), but § 1681h(e) permits Gorman to state a cognizable libel claim by alleging "malice"

or "willful intent to injure." *Gorman*, 370 F. Supp. 2d at 1009-10. The Court instructed Gorman to amend his complaint "to identify which statements are libelous and when they were made." *Id.* at 1010.

MBNA argues that Gorman's libel claim is preempted because Gorman has failed to present evidence of malice or willful intent to injure. Because the issue is whether Gorman's state law claim is preempted by the FCRA, the interpretation of "malice" or "willful intent to injure" in the FCRA is a question of federal statutory interpretation, and not a question of state law as Gorman contends in his Opposition (Docket Item No. 70, "Opp." at 14). The FCRA does not define "malice" or "willful intent to injure," and the Ninth Circuit has not defined the terms in the context of the FCRA. Other district courts, however, have concluded that "[i]n cases interpreting the FCRA's relationship to state law claims of defamation and invasion of privacy, the phrase 'malice' in § 1681h(e) has been interpreted to be 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Hukic v. Aurora Loan Services, Inc.*, No. 05 C 4950, 2006 WL 1457787 at *3 (N.D. Ill. May 22, 2006).

MBNA has provided evidence that they did not act with "malice" or with "willful intent to injure" Gorman. MBNA investigated Gorman's dispute as to the Four Peaks incident, and concluded that since Gorman never returned the merchandise, Gorman was not entitled to a reversal of the charges, and the

account balance would be charged off to Wolpoff for collection. (Lempley Decl. ¶¶ 5-16.)

In light of MBNA's showing, Gorman must raise a genuine issue of material fact that his claim is not preempted by 15 U.S.C. § 1681t(b) because MBNA acted with "malice" or with a "willful intent to injure." Gorman's Opposition states only that Gorman made multiple written demands to MBNA, but MBNA continued to "report the account as delinquent without including a notation that the debt is disputed by the account holder." (Plaintiff's Opposition to MBNA's Motion for Summary Judgment, "Opp. to MBNA" (Docket Item No. 70) at 13.) However, simple allegations are insufficient at the summary judgment stage. The record does not include any credit reports that report a delinquency but do not include the notation requested by Gorman. Nor has Gorman presented any evidence that MBNA has made untruthful representations to the CRAs. As the non-moving party with the ultimate burden of proof at trial, Gorman need not present evidence that would be admissible at trial in order to defeat a motion for summary judgment, but he may not rely on "mere pleadings." *Celotex*, 477 U.S. at 324. Because Gorman has not raised a genuine issue of material fact as to "malice" or "willful intent to injure," summary judgment is granted in favor of MBNA that Gorman's state law libel claim is preempted by the FCRA.

C. FDCPA

1. Meaningful Involvement

Gorman's Opposition to Wolpoff's Motion for Summary Judgment raises, for the first time, an allegation that Wolpoff violated § 1692(e)(3) by sending a collection letter on law firm letterhead without first having an attorney at the firm conduct a meaningful review of the circumstances surrounding Gorman's alleged debt. Gorman appears to rely on a decision in the Second Circuit finding Wolpoff liable for such a violation. (Plaintiff's Opposition to Wolpoff's Motion for Summary Judgment, "Opp. to Wolpoff" (Docket Item No. 71) at 7-9) (citing *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292 (2d Cir. 2003).)[.]

This new allegation in Gorman's Opp. to Wolpoff is dismissed as procedurally improper. Gorman's SAC only alleges violations of §§ 1692(c) and 1692d against Defendant Wolpoff; no violations of § 1692(e) are alleged. A plaintiff may not raise a new theory of liability for the first time, after the close of discovery, in his opposition to summary judgment without amending his complaint. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). In the Ninth Circuit, a district court is not required to permit an amendment of the complaint to include a claim first raised in the summary judgment papers. *Id.* at 1294-95. The court in *Coleman* determined that the plaintiffs "must show good cause for not having amended their complaints" which "primarily considers the diligence of the party seeking the amendment."

Id. at 1295 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992)). Thus, even if Gorman had wished to amend the SAC at this late stage, the Court may deny such a motion based on Gorman's inability to show that he has been diligently seeking such an amendment, or any other good cause for the delay.

It is also apparent from this record that such an amendment would be futile. Wolpoff has provided evidence that an attorney at Wolpoff reviewed Gorman's file on January 9, 2004, prior to the sending of a collection letter dated January 12, 2004. (Decl. of Ronald Cantor, Exh. A., BATES WA 0006.) Gorman's response to this evidence is twofold. First, Gorman argues that the evidence is inadmissible hearsay. The Court notes that by Mr. Cantor's declaration authenticating the records, it appears that the evidence may be admissible under the business records exception to the hearsay rule. Second, Gorman contends that "[i]f a file review had been conducted by a Wolpoff attorney, the attorney apparently did not note (or simply ignored) plaintiff's August 7, 2003 letter. . . . If the Wolpoff attorney was aware of this letter, he or she would know that by sending the January 12, 2004 collection letter and initiating a series of collection calls, Wolpoff was committing a flagrant violation of 15 U.S.C. § 1692c(c)." This Court declines to permit any failure of a law firm to comply with the FDCPA to be automatically bootstrapped into a violation of § 1692(e)(3) simply based on what an attorney should have known.

2. Telephone Calls

In his FAC, Gorman alleges that Wolpoff's calls to him violated the FDCPA. To the extent that Gorman alleges that these calls violated the FDCPA because Gorman notified MBNA about his desire to not be called, Gorman's claim fails as a matter of law. While the Ninth Circuit has not addressed the issue of whether a creditor's knowledge may be imputed to a debt collector, this Court is persuaded by the reasoning in the Seventh Circuit:

> A distinction between creditors and debt collectors is fundamental to the FDCPA, which does not regulate creditors' activities at all. Courts do not impute to debt collectors other information that may be in creditors' files—for example, that debt has been paid or was bogus to start with. This is why debt collectors send out notices informing debtors of their entitlement to require verification and to contest claims.

Randolph v. IMBS, Inc., 368 F.3d 726, 729 (7th Cir. 2004). *See also Schmitt v. FMA Alliance*, 398 F.3d 995, 997 (8th Cir. 2005) (imputing a creditor's actual knowledge of a debtor's representation to the debt collector "contradicts established agency law, which dictates that while the knowledge of the agent is imputed to the principal, the converse is not true"). Based on the reasoning in *Randolph* and *Schmitt*, Gorman may not base a violation of the FDCPA on his statements to MBNA.

As to Gorman's allegations based on his statements to Wolpoff and based on actions actually attributable to Wolpoff, Gorman has significantly narrowed his allegations from the "several hundred" phone calls alleged in the FAC and SAC:

> The request that Wolpoff not call was also communicated directly to Wolpoff personnel, as confirmed by two auto dialer exclusion notations contained in Wolpoff's own records. Yet Wolpoff placed at least thirteen calls to Gorman's residence during a six-week period. Moreover, many of the calls were made outside of normal business hours (two of which appear to reflect that they were made past 9:00 p.m.). In total, Wolpoff acknowledges that it and its "auto-dialer" placed at least 24 calls to Gorman's home and place of business during a six-week period despite being asked not to do so. The placing of these calls was in violation of § 1693d's prohibition against "repeated" or "continuous" phone calls.

Opposition at 14:1-8. As framed in the Opposition, the only evidence of the number of the calls made by Wolpoff is Wolpoff's call log. The only evidence of the time of day at which Wolpoff made these calls is also Wolpoff's call log. The record does not contain any other evidence of calls from Wolpoff other than this call log.

The evidence in the record demonstrates that Gorman's interpretation of Wolpoff's call log is inaccurate. Wolpoff's call logs indicate that no calls were

made after February 22, 2004, following a notation on the call log that Wolpoff had received a letter from the debtor. By declaration, Wolpoff states that the "dialer exclusion" notation in the call log is a code indicating "that the collector coded the account would be placed for that day." (Supp. Decl. of Ronald Cantor in Supp. of Mot. for Summ. J., ("Supp. Cantor Decl."), Docket Item No. 83, at ¶ 2.) Wolpoff also represents that its automatic dialers are programmed on Eastern Standard Time, so it is evident from the call logs that none of the calls were made after 9:00 p.m. local time. (Supp. Cantor Decl., at ¶ 3.)

Congress did not intend the FDCPA to completely bar any debt collection calls. By declaration, and as indicated in the call logs, Wolpoff only made contact with Mr. Gorman on a single occasion on February 4, 2004, and Wolpoff never attempted to contact Gorman at the same phone number more than two times on the same day. Even if the Court were to find that such acts were "repeated and continuous" Gorman has not attempted to raise a genuine issue of material fact as to the intent of Wolpoff in making these collection calls.

Upon Wolpoff's showing of the absence of a triable issue on which Mr. Gorman ultimately bears the burden at trial, Mr. Gorman must raise a genuine issue of material fact that Wolpoff violated the FDCPA as alleged in the SAC. While this Court must draw all reasonable inferences in favor of the non-moving party, Mr. Gorman, the Court also requires that Mr. Gorman direct this Court to evidence in his

favor. In his deposition, and in his Opposition to Wolpoff's present motion, Mr. Gorman alleges very few facts relating to Wolpoff specifically, and presents even less evidence of Wolpoff's actions. Mr. Gorman does not provide any evidence, even by his own deposition testimony or his declaration submitted in support of his opposition to the present motion, that a caller from Wolpoff called after he requested from Wolpoff that Wolpoff cease collection calls, or that Wolpoff called repeatedly and continuously. Nor does Mr. Gorman provide any evidence that Wolpoff called after 9:00 p.m. local time. A general allegation that Wolpoff calls are a subset of all collection calls, only invites speculation and does not raise a genuine issue of material fact as to the FDCPA claims asserted in the SAC against Wolpoff.

D. Bad Faith Under the FDCPA

The FDCPA provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. 1692k(a)(3). In order to prevail there must be evidence that the plaintiff knew that his claim was meritless and that plaintiff pursued his claims with the purpose of harassing the defendant. *See Jacobson v. Healthcare Financial Services, Inc.*, 2006 WL 1528959 at * 6 (E.D.N.Y. June 6, 2006) (granting Defendant's request for costs and attorney's fees pursuant to 1692k(a)(3) where the plaintiff's

"mistaken belief that the alleged violation of the statute, arrived at merely by a strained construction of [the collection letter's] language, constitutes per se harassment is, in essence, a complaint against the creditor for the temerity of requesting that he pay what he owes").

Gorman's actions as to MBNA and Wolpoff are not entirely above suspicion. Gorman stopped making payments to his MBNA credit card after May 13, 2003 (Gorman Depo. 167:23-25) but then deliberately charged thousands of dollars more on his MBNA credit card on goods and services unrelated to the disputed $759.70 Four Peaks charge. In his letter to MBNA dated August 7, 2003, Gorman appears to be engaging in a self-help remedy in attempting to have MBNA stop collection on the entirety of his balance of over $5000: "My attorneys' fees exceed the amount owed on this account. Consequently I hereby assert the right to offset the legal fees against the account balance and I will not be making any further payments." (Lepley Decl. Exh. 12.)

As to Wolpoff in particular, the record is wholly devoid of support that Wolpoff made a serious portion of the "at least several hundred telephone calls to plaintiff" that Gorman alleges in the SAC were made by "MBNA, Wolpoff, and Does 1-20." (SAC ¶ 10.)

Despite these troubling undisputed facts in the record, the Court notes that MBNA has not moved for a finding of bad faith, and gives Gorman the benefit of the doubt that he may not have filed his entire

lawsuit with the intent to harass MBNA and Wolpoff. Thus, the Court does not make an express finding that the entire suit was filed in bad faith and for the purposes of harassment as required for defendant to recover attorneys' fees under 1692k. *See Shah v. Collecto, Inc.*, 2005 WL 2216242 at *15 (D. Md. Sept. 12, 2005).

E. Rule 11

Although the Court, in an abundance of leniency, believes that Gorman may have been sufficiently confused about the legal rule so as to narrowly avoid a finding of bad faith under § 1692k(a)(3), Gorman's representations to the Court as to the factual allegations underlying his case runs afoul of FED. R. CIV. P. 11. Rule 11(b) requires that in all representations to the court an attorney conduct "an inquiry reasonable under the circumstances" and Rule 11(b)(3) requires that representations regarding "the allegations and other factual contentions" following such an inquiry "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Gorman, himself an attorney bound by the dictates of Rule 11, appeared before this Court to represent himself on April 25, 2005 at a hearing on Defendants' motion to dismiss. At that hearing, the following exchange took place:

The Court: Who made the calls?

Mr. Gorman: The law firm and the computer generated phone calls plus live people.

The Court: What is your allegation as to who made them?

Mr. Gorman: It said the Defendants made them.

The Court: Who are the Defendants?

Mr. Gorman: Wolpoff & Abramson.

The Court: I see MBNA and Does 1 through 100 and Wolpoff & Abramson[.]

Mr. Gorman: Correct. Every day there were three phone calls at all hours of the day and sometimes they would say we're calling from MBNA, and sometimes they would say we're calling from Wolpoff & Abramson, and sometimes it was a computer and the phone would keep ringing nonstop. It was classic bill collector harassment.

(Decl. of Tomio Narita in Support of Mot. for Summ. J. and Request for Finding of Bad Faith by Def. Wolpoff & Abramson LLP, Exh. B, Tr. of April 25, 2006 Hearing) (emphasis added). Gorman expressly represented to the Court that his allegation as to who made the calls was "Wolpoff & Abramson." As the subject of Wolpoff's alleged harassment, Gorman was in possession from the very outset of this suit of all the information about whether and how often Wolpoff had called; and yet, it was the Court, that reminded

Gorman that MBNA and Does 1-100 may also have made these calls.

Based in part on Gorman's representations at the hearing of Wolpoff's involvement, this Court permitted Gorman to amend his Complaint against Wolpoff to allege an FDCPA violation arising out of Wolpoff's collection calls. Gorman's SAC, filed after the hearing and the Court's Order, alleged:

> Beginning in or about June and July 2003 and continuing through on or about February 20, 2004, defendants MBNA, Wolpoff, and Does 1-20 placed multiple telephone calls to plaintiff at both his residence and his office in an attempt to collect payment of the disputed charges. On information and belief, the defendants placed **at least several hundred telephone calls** to plaintiff despite being repeatedly instructed not to call. Such calls were placed at various times of the day, including early mornings and late at night, as well as on weekends."

(SAC ¶ 10, hereinafter "Paragraph 10") (emphasis added). The call log, as the only evidence of Wolpoff calls in the record, indicates that Wolpoff actually spoke to Gorman a single time out of Wolpoff's twenty-four attempts. Confusing the single Wolpoff call he actually received with a larger set of "several hundred telephone calls" is outside the realm of good faith mistake.

Should Gorman wish to defend the technical veracity of Paragraph 10 because he merely alleges

that Wolpoff's calls were a subset of the Defendants' calls, and not that Wolpoff made all of the "several hundred telephone calls," the Court reminds Gorman of his statements at the April 25, 2006 hearing. The complete absence of evidence in the record to support his allegations that Wolpoff made any serious portion of the "several hundred telephone calls" suggests that Gorman, at best, failed to conduct a reasonable inquiry, and, at worst, made deliberate misrepresentations to this Court. *See Mezzetti v. State Farm Mut. Auto. Ins. Co.*, 346 F. Supp. 2d 1058, 1067 (N.D. Cal. 2004) (noting that "[g]obbledygook can be no less obfuscatory than an outright lie").

Accordingly, pursuant to Rule 11(c)(1)(B), the Court orders Gorman to show cause, if any, why Rule 11 sanctions in the amount of Wolpoff's attorneys' fees and costs following the filing of the SAC should not be awarded. *See, e.g., Terran v. Kaplan*, 109 F.3d 1428, 1435 (9th Cir. 1997).

V. CONCLUSION

For the reasons stated above, MBNA's Motion for Summary Judgment is GRANTED. Wolpoff's Motion for Summary Judgment is GRANTED in favor of Wolpoff, but Wolpoff's request For a Finding of Bad Faith under 15 U.S.C. § 1692k(a)(3) is DENIED.

The Court orders Gorman to show cause, if any, by filing and serving a brief on or before July 31, 2006, why sanctions under Rule 11 should not be imposed for the amount of Wolpoff's attorneys' fees

following the filing of the SAC. Wolpoff may file and serve a responsive brief on or before August 25, 2006. A hearing on the order to show cause re: Rule 11 sanctions is scheduled for September 18, 2006 at 9:00 a.m.

Dated: June 23, 2006

/s/ James Ware
JAMES WARE
United States
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN
DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

John Gorman,

Plaintiff(s),

v.

Wolpoff & Abramson, LLP, et al,

Defendant(s). /

NO. C 04-04507 JW

ORDER GRANTING MOTIONS TO DISMISS

(Filed May 4, 2005)

I. INTRODUCTION

John Gorman ("Gorman" or "Plaintiff") filed a Complaint against MBNA and MBNA's attorney, Wolpoff & Abramson, alleging libel and violations of various state and federal fair credit reporting and debt collection statutes. MBNA and Wolpoff & Abramson (collectively "Defendants") each filed a Motion to Dismiss the Complaint. Plaintiff failed to file an Opposition, and instead filed a First Amended Complaint. The Court dismissed Plaintiff's First Amended Complaint, but has granted a Motion for Reconsideration because, technically, the First Amended Complaint rendered moot Defendants' Motions to Dismiss. Defendants have each filed a Motion to Dismiss the First Amended Complaint. Based on all papers filed to date and the hearing

conducted on April 25, 2005, the Court grants Defendants' Motions to Dismiss.

II. BACKGROUND

Gorman's First Amended Complaint ("FAC") alleges the following facts. Gorman is an attorney and a former holder of a MBNA Visa credit card. (FAC ¶ 4.) "In or about 2003," Gorman "timely" gave notice that he disputed the legitimacy of "certain charges" that were posted to his account. (FAC ¶¶ 7, 8.) Upon receiving the written notification, MBNA temporarily removed the charges, but later reposted them and refused to remove them again. (FAC ¶ 8.) MBNA retained Wolpoff & Abramson, a law firm that handles debt collection cases, to initiate legal action against Gorman. (FAC ¶¶ 2, 9.) From 2003 through 2004, MBNA and Wolpoff & Abramson placed multiple "threatening and harassing" telephone calls to Gorman's residence and office regarding his alleged debt. (FAC ¶ 10.) Gorman requested in writing that they cease making such telephone communications. (FAC ¶ 10.)

In Spring 2004, Gorman discovered that MBNA was "falsely and inaccurately reporting" to various credit reporting agencies that he was delinquent on his obligations to MBNA, without reporting that the debt was "disputed." (FAC ¶¶ 11, 12.) Gorman wrote MBNA, requesting that it correct the information. (FAC ¶ 10.) He also wrote the credit reporting agencies to notify them that MBNA's information was

"disputed, mistaken and [should] be corrected." (FAC ¶ 12.) The credit reporting agencies, in turn, notified MBNA about Gorman's dispute. (FAC ¶ 12.) MBNA did not conduct a "complete and sufficient investigation,"[1] and continues to report Gorman's debt as delinquent without indicating that the charges are disputed. (FAC ¶ 12.)

Gorman filed the underlying First Amended Complaint, asserting against MBNA claims based on libel and violations of California Civil Code § 1785.25(a) (furnishing incomplete or inaccurate information to a credit reporting agency), the Fair Credit Reporting Act ("FCRA") (15 U.S.C. §§ 1681n (willful violation of the FCRA), 1681o (negligent violation of the FCRA)) and the Fair Debt Collection Practices Act ("FDCPA") (15 U.S.C. §§ 1692c (improper debt collection communications),[2] 1692d (harassment or abuse)).[3] The First Amended Complaint also asserts a claim against Wolpoff & Abramson for

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[1] Gorman actually alleges that MBNA "failed to conduct an incomplete and insufficient investigation." The Court presumes this double negative was careless error and, therefore, construes the allegation to aver that MBNA failed to conduct a complete and sufficient investigation.

[2] Gorman's First Amended Complaint alleges a violation of 15 U.S.C. § 1692(c). Because it appears that Plaintiff intended to allege a violation of § 1692c, the Court will construe it as the latter.

[3] In his Opposition to MBNA's Motion to Dismiss the First Amended Complaint, Gorman agreed to voluntarily dismiss his FDCPA claim against MBNA. (Plaintiff's Mem. P. & A. in Opp'n to MBNA's Mot. to Dismiss FAC at 3, 19.)

violating the FDCPA. (FAC ¶¶ 34-36.) MBNA and Wolpoff & Abramson, each filed a Motion to Dismiss the First Amended Complaint based on FED. R. CIV. P. 12(b).

III. STANDARDS

A complaint can be dismissed if it fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). A complaint can fail to state a claim if it fails to allege sufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In ruling on a motion to dismiss, the Court must accept all allegations of material fact as true and must construe those allegations in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enterprises*, 476 F.2d 393, 396 (9th Cir. 1973). A Rule 12(b)(6) motion must not be granted unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.1997).

IV. DISCUSSION

Defendant MBNA argues that Plaintiff's libel and CAL. CIV. CODE § 1785.25 claims should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) because they are preempted by the FCRA. (Mem. of P. & A. in Supp. of MBNA's Mot. to Dismiss FAC at 3-7.) MBNA also argues that the FCRA claims should be dismissed because there is no private right of action and, even if there is, sufficient facts have not been alleged to state a claim. (*Id.* at 8-10.) Defendant Wolpoff & Abramson argues that the FDCPA claim should be dismissed because the First Amended Complaint contains nothing except conclusory allegations. (Mem. of P. & A. in Supp. of Wolpoff & Abramson's Mot. to Dismiss FAC at 3-8.) The Court will address each claim seriatim.

A. Preemption

Not all state claims related to credit reporting are preempted by the FCRA. 15 U.S.C. § 1681t(a). Subsection 1681t(b), however, preempts all state claims to the extent that they regulate the responsibilities of persons who furnish information to consumer reporting agencies. *Compare* 15 U.S.C. § 1681t(b)(1)(F) (preempting state law that imposes requirements or prohibitions on subject matter regulated by § 1681s-2) *and* 15 U.S.C. § 1681s-2 (regulating the responsibilities of persons who furnish information to consumer reporting agencies)[.]

1. Plaintiff's Libel Claim Is Not Preempted, But Is Not Sufficiently Stated

MBNA argues that Plaintiff's libel claim is preempted by § 1681t(b) since it attempts to regulate MBNA's responsibilities as a furnisher of information to credit reporting agencies. (Mem. P. & A. in Supp. of MBNA's Mot. to Dismiss FAC at 3-4.) Plaintiff does not appear to dispute that his claim would be preempted if § 1681t(b) were the only relevant provision. Rather, Plaintiff argues that his libel claim is not preempted by § 1681t(b) because another subsection of the FCRA, § 1681h(e), specifically allows him to state a cognizable libel claim by alleging "malice" or "willful intent to injure." (Plaintiff's Mem. P. & A. in Opp'n to MBNA's Mot. to Dismiss FAC at 10, 11.)

The FCRA contains multiple preemption provisions —some general, some specific. *Gordon v. Greenpoint Credit,* 266 F. Supp. 2d 1007, 1013 (S.D. Iowa 2003). Subsection 1681t(b) is a general preemption provision. *Id.* (noting that § 1681t is entitled "General exceptions"). Subsection 1681h(e), by contrast, is a specific provision that preempts, *inter alia,* certain defamation claims. *Id.* (finding that § 1681h(e) is a much narrower preemption provision than § 1681t(b)). Section 1681h provides in relevant part:

> (e) Limitation of liability. . . . [N]o consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against . . . any person who

> furnishes information to a consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. § 1681h (2005). Subsection 1681h(e) preempts only defamation actions that do not allege malice or willful intent to injure. *Swecker v. Trans Union Corp.*, 31 F. Supp. 2d 536, 539 (E.D. Va. 1998).

Gorman's libel claim is not preempted by the FCRA because it alleges malice or willful intent to injure, even if it otherwise would be preempted by § 1681t(b). One canon of statutory construction mandates that a general statute yield when there is a specific statute involving the same subject matter. *In re Garmon*, 572 F.2d 1373, 1376 (9th Cir. 1978). Section 1681h(e) is a more specific statute, which preempts only a limited number of common law torts rather than all state claims that regulate furnishers of information to credit reporting agency. Consequently, § 1681t(b) must yield if it involves the same subject matter as § 1681h(e). Here, it does. The Court can analyze MBNA's alleged reporting of libelous information under either subsection. Thus, § 1681t(b) must yield to § 1681h(e). Section 1681h(e) permits Gorman to bring his claim for libel so long as he alleges maliciousness or willfulness.

The Court realizes that its holding today conflicts with *Davis v. Maryland Bank*, which holds that § 1681t(b)(1)(F) preempts all state claims based on conduct falling within the coverage of 1681s-2, even

malicious and willful tortious conduct. 2002 WL 32713429 (N.D. Cal. 2002). In *Davis*, the Court reconciled the apparent conflict between the general and specific statutes by applying § 1681h(e) only to conduct that is not already governed by 1681s-2 and thereby preempted by 1681t(b). *Davis* at *14 (concluding that where a furnisher of information calls a consumer a "liar", such conduct is not governed by 1681s-2 and, therefore, a claim for intentional inflection of emotional distress may be filed; however, where a furnisher of information fails to properly investigate information disclosed to a credit reporting agency, such conduct is governed by 1681s-2 and, therefore, any claim for negligence is preempted). The Court is not persuaded by the logic in *Davis* because it violates a canon of statutory construction by allowing a general statute to trump a specific statute.

Gorman's libel claim is not preempted, but its dismissal is still proper because Gorman fails to allege sufficient facts. *Robertson*, 749 F.2d at 534. Gorman uses non-descriptive phrases (e.g., "[i]n or about 2003" and "a dispute arose") and legal conclusions (e.g., "Plaintiff timely notified", "defamatory information", "threatening and harassing", "wrongfully refused", "sufficient investigation", and "should be corrected") throughout his First Amended Complaint (FAC ¶¶ 7-8, 10-12) and, thereby, fails to give MBNA sufficient notice of his claim. *Gulf Coast Western Oil Co. v. Trapp*, 165 F.2d 343, 348 (10th Cir. 1947) (holding that even under the liberal rules of pleading,

a complaint must particularize the issue sufficiently to enable the defendant to prepare its defense). The First Amended Complaint merely recites the elements necessary to state a FCRA or FDCPA claim, without alleging facts to fill those elements. MBNA's defense may vary dramatically if the alleged defamatory statements were made after, rather than before, Wolpoff & Abramson concluded its legal proceedings on MBNA's behalf. Gorman fails to give notice of even one particular statement that is false and, thus, dismissal of the libel claim is proper. *Adams v. Johnson,* 355 F.3d 1179, 1183 (9th Cir. 2004) (stating that "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss").

Gorman's libel claim is dismissed with leave to amend. On leave, the complaint should be amended to identify which statements are libelous and when they were made.

2. Plaintiff's California Civil Code § 1785.25 Claim Is Preempted

MBNA argues § 1681t(b) also preempts Gorman's claim for violation of the California Civil Code. (Mem. of P. & A. in Supp. of MBNA's Mot. to Dismiss FAC at 7.) Gorman argues that because a subsection of § 1681t(b) excepts from preemption CAL. CIV. CODE § 1785.25(a), he can bring suit for a violation of the Civil Code. (Plaintiff's Mem. of P. & A. in Opp'n to MBNA's Mot. to Dismiss FAC at 11-15.)

California Civil Code § 1785.25(a) provides that "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." CAL. CIV. CODE § 1785.25(a). California grants a private right of action to enforce this provision in §§ 1785.25(g) and 1785.31. Subsection 1785.25(g) states that a "person who furnishes information to a consumer credit reporting agency is liable for failure to comply with the section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with the section, the furnisher maintained reasonable procedures to comply with those provisions." CAL. CIV. CODE § 1785.25(g). Section 1785.31 provides to "'any consumer who suffers damages as a result of a violation of this title' the ability to 'bring an action in a court of appropriate jurisdiction against that person.'" *Lin v. Universal Card Servs. Corp.*, 238 F. Supp. 2d 1147, 1152 (N.D. Cal. 2002) (quoting CAL. CIV. CODE § 1785.31). When Congress enacted the FCRA, it expressly saved California Civil Code 1785.25(a) from preemption by carving out an exception for that subsection in the preemption provision, but it did not similarly save § 1785.25(g) or § 1785.31. *Id.* at 1152; *see also Quigley v. Pennsylvania Higher Edu. Assist. Agency*, 2000 WL 1721069 at *3 (N.D. Cal. 2000) (analyzing 15 U.S.C. § 1681t(b)(1)(F)(ii)).

Although § 1785.25(a) of the California Civil Code is not preempted and, therefore, MBNA can be held liable if it violated that statute, the proper parties to pursue such liability are Federal and State officials. *Lin*, 238 F. Supp. 2d at 1152. The FCRA did not except from preemption § 1785.25(g) or § 1785.31, and thus those sections are preempted by 15 U.S.C. § 1681t(b)(1)(F). *Id.* Without the benefit of those sections, Gorman has no private right of action to bring suit for a violation of § 1785.25(a). *Quigley*, at *3; *Lin* at 1152.

Dismissal of the claim based on CAL. CIV. CODE § 1785.25 is proper.

B. A Limited Private Right of Action Exists, But Plaintiff Fails to Sufficiently State a FCRA Claim

Gorman argues that, regardless of whether the state law claims are preempted by the FCRA, MBNA is liable for violating the FCRA. (Plaintiff's Mem. of P. & A. in Opp'n to MBNA's Mot. to Dismiss FAC at 15-19.) According to Gorman, MBNA violates § 1681s-2 of the FCRA by failing to "accurately report credit information about consumers to credit reporting agencies, [to] report the existence of any dispute about any allegedly delinquent charges, and [to] promptly verify and correct any contested information provided by them to a credit reporting bureau." (FAC ¶¶ 26, 27, 31, 32.) Gorman further argues that sections 1681n and 1681o grant a private right of

action for violations of § 1681s-2. MBNA counters, however, that dismissal of Gorman's claim is proper because no private right of action in fact exists to enforce violations of § 1681s-2(a), and because not enough facts are alleged to state a claim for violation of § 1681s-2(b). (Mem. of P. & A. in Supp. of MBNA's Mot. to Dismiss FAC at 8-10.)

The FCRA, 15 U.S.C. § 1681 *et seq.*, provides protections to ensure the "[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681(a). Section 1681s-2 regulates the responsibilities of furnishers of information to consumer reporting agencies. Subsection (a) imposes a duty upon furnishers of information to provide accurate information. It prohibits the reporting of erroneous information, imposes a duty to correct and update information, and imposes a duty to provide notice of a consumer's dispute. 15 U.S.C. § 1681s-2(a). Subsection (b) imposes additional duties once the furnisher of information receives notice of the consumer's dispute from a credit reporting agency. This subsection requires the furnisher of information to conduct an investigation, review all relevant information, report the results, and modify, delete or block inaccurate or incomplete information. 15 U.S.C. § 1681s-2(b). Generally, all of the provisions of the FCRA can be privately enforced under §§ 1681n or 1681o if a willful or negligent violation occurs. 15 U.S.C. §§ 1681n, 1681o. The Ninth Circuit has held, however, that subsections (c) and (d) of § 1681s-2 provide that there is no private right of action to enforce the obligations established by § 1681s-2(a).

Nelson v. Chase Manhattan Mortgage Co[rp]., 282 F.3d 1057, 1059 (9th Cir.2002) (stating "private enforcement under §§ n & o is excluded"). Those obligations must be enforced by federal and state officials. *Id.*

No private right of action exists to redress violations of 1681s-2(a), and therefore the § 1681n and § 1681o claims can survive MBNA's motion to dismiss only if Gorman can base them on willful and negligent violations of § 1681s-2(b). *Id.*

The FCRA claims fail because they are also based on non-descriptive phrases and legal conclusions. However, the allegations in the First Amended Complaint provide the framework of a cognizable FCRA claim, and thus leave to amend should be granted. Gorman alleges that MBNA received notice of his dispute from the credit reporting agencies, thus triggering the duties imposed by subsection 1681s-2(b). (FAC ¶ 12.) Gorman further alleges that those duties were violated because the debt was not delinquent, yet MBNA maliciously and willfully "failed to take any corrective action and continue[d] to report the debt as delinquent without indicating that the charges are disputed. . . ." (FAC ¶¶ 12, 27, 39, 32.) This violates § 1681s-2(b)'s mandate that inaccurate information must be modified, deleted or blocked.

The claims based on 15 U.S.C. § 1681n and § 1681o are dismissed with leave to amend.

C. The Fair Debt Collection Practices Act Claim Is Not Sufficiently Stated

Gorman's FDCPA claim is asserted only against Wolpoff & Abramson. (Mem. of P. & A. in Opp'n to MBNA's Mot. to Dismiss FAC at 3, 19.) Plaintiff alleges that Wolpoff & Abramson is a debt collector that has violated 15 U.S.C. §§ 1692c and 1692d. (FAC ¶¶ 34-36.)

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Section 1692c proscribes certain debt collection communications. It prohibits communications "at any unusual time or place" and "at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication." 15 U.S.C. § 1692c(a). Once the consumer notifies the debt collector in writing that he wishes the debt collector to cease further communication, the debt collector can initiate further communications only for limited purposes. 15 U.S.C. § 1692c(c). Section 1692d proscribes harassment or abuse such as threats of violence, profane language, etc. 15 U.S.C. § 1692d.

Gorman only alleges conclusory statements and fails to satisfy even the liberal pleading standards of

Rule 8 of the Federal Rules of Civil Procedure. *Robertson*, 749 F.2d at 534 (stating that "[a] complaint may be dismissed as a matter of law for . . . insufficient fact[ual allegations]"). Wolpoff & Abramson cannot be expected to craft a responsive pleading when Gorman fails to allege the date or contents of even one call that Wolpoff & Abramson allegedly made. Moreover, even assuming that Wolpoff & Abramson called Gorman's place of employment, such a call does not violate § 1692c because Gorman does not allege that Wolpoff & Abramson had reason to know Gorman's employer prohibits the call. 15 U.S.C. § 1692c(a) (requiring debt collectors to know or have reason to know that the consumer's employer prohibits debt collection communications to trigger the duty to refrain from communicating). Likewise, Gorman's allegation that he received "harassing, threatening, abusive, oppressive, and annoying telephone calls" is conclusory and insufficient to state a claim based on § 1692d. *Robertson*, 749 F.2d at 534.

The FDCPA claim is dismissed with leave to amend.

V. CONCLUSION

The Court GRANTS MBNA's and Wolpoff & Abramson's Motions to Dismiss. Plaintiff's California Civil Code § 1785.25 claim is dismissed without leave to amend. Plaintiff's FCRA claims based on 15 U.S.C. § 1681s-2(b), Plaintiff's libel claim, and Plaintiff's

FDCPA claim are all dismissed with leave to amend. Plaintiff shall file his Second Amended Complaint on or before June 24, 2005.

Dated: May 4, 2005

/s/ James Ware
JAMES WARE
United States
District Judge

APPENDIX E

Selected Provisions of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x

§ 1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission

* * *

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of

the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States.—In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators.—The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers.—For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending.—If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required.—A State may not bring an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable. In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

* * *

§ 1681s-2. Responsibilities of furnishers of information to consumer reporting agencies

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if—

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

(C) No address requirement

A person who clearly and conspicuously specifies to the consumer an address for notices referred to in subparagraph (B) shall not be subject to subparagraph (A); however,

nothing in subparagraph (B) shall require a person to specify such an address.

(D) Definition

For purposes of subparagraph (A), the term "reasonable cause to believe that the information is inaccurate" means having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information.

(2) Duty to correct and update information

A person who—

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate,

shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

(3) Duty to provide notice of dispute

If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer.

(4) Duty to provide notice of closed accounts

A person who regularly and in the ordinary course of business furnishes information to a consumer reporting agency regarding a consumer who has a credit account with that person shall notify the agency of the voluntary closure of the account by the consumer, in information regularly furnished for the period in which the account is closed.

(5) Duty to provide notice of delinquency of accounts

(A) In general

A person who furnishes information to a consumer reporting agency regarding a delinquent account being placed for collection, charged to profit or loss, or subjected to any similar action shall, not later than 90 days after furnishing the information, notify the agency of the date of delinquency on the account, which shall be the month and year of the commencement of the delinquency on the account that immediately preceded the action.

(B) Rule of construction

For purposes of this paragraph only, and provided that the consumer does not dispute the information, a person that furnishes information on a delinquent account that is placed for collection, charged for profit or loss, or subjected to any similar action, complies with this paragraph, if—

(i) the person reports the same date of delinquency as that provided by the creditor to which the account was owed at the time at which the commencement of the delinquency occurred, if the creditor previously reported that date of delinquency to a consumer reporting agency;

(ii) the creditor did not previously report the date of delinquency to a consumer reporting agency, and the person establishes and follows reasonable procedures to obtain the date of delinquency from the creditor or another reliable source and reports that date to a consumer reporting agency as the date of delinquency; or

(iii) the creditor did not previously report the date of delinquency to a consumer reporting agency and the date of delinquency cannot be reasonably obtained as provided in clause (ii), the person establishes and follows reasonable procedures to ensure the date reported as the date of delinquency precedes the

date on which the account is placed for collection, charged to profit or loss, or subjected to any similar action, and reports such date to the credit reporting agency.

(6) Duties of furnishers upon notice of identity theft-related information

(A) Reasonable procedures

A person that furnishes information to any consumer reporting agency shall have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency under section 1681c-2 of this title relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information.

(B) Information alleged to result from identity theft

If a consumer submits an identity theft report to a person who furnishes information to a consumer reporting agency at the address specified by that person for receiving such reports stating that information maintained by such person that purports to relate to the consumer resulted from identity theft, the person may not furnish such information that purports to relate to the consumer to any consumer reporting agency, unless the person subsequently knows or is informed by the consumer that the information is correct.

(7) Negative information

(A) Notice to consumer required

(i) In general

If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 1681a(p) of this title furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.

(ii) Notice effective for subsequent submissions

After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 1681a(p) of this title with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.

(B) Time of notice

(i) In general

The notice required under subparagraph (A) shall be provided to the customer prior to, or no later than 30 days after, furnishing the negative information to a consumer reporting agency

described in section 1681a(p) of this title.

(ii) Coordination with new account disclosures

If the notice is provided to the customer prior to furnishing the negative information to a consumer reporting agency, the notice may not be included in the initial disclosures provided under section 1637(a) of this title.

(C) Coordination with other disclosures

The notice required under subparagraph (A)—

(i) may be included on or with any notice of default, any billing statement, or any other materials provided to the customer; and

(ii) must be clear and conspicuous.

(D) Model disclosure

(i) Duty of Board to prepare

The Board shall prescribe a brief model disclosure a financial institution may use to comply with subparagraph (A), which shall not exceed 30 words.

(ii) Use of model not required

No provision of this paragraph shall be construed as requiring a financial institution to use any such model form prescribed by the Board.

(iii) Compliance using model

A financial institution shall be deemed to be in compliance with subparagraph (A) if the financial institution uses any such model form prescribed by the Board, or the financial institution uses any such model form and rearranges its format.

(E) Use of notice without submitting negative information

No provision of this paragraph shall be construed as requiring a financial institution that has provided a customer with a notice described in subparagraph (A) to furnish negative information about the customer to a consumer reporting agency.

(F) Safe harbor

A financial institution shall not be liable for failure to perform the duties required by this paragraph if, at the time of the failure, the financial institution maintained reasonable policies and procedures to comply with this paragraph or the financial institution reasonably believed that the institution is prohibited, by law, from contacting the consumer.

(G) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Negative information

The term "negative information" means information concerning a customer's delinquencies, late payments, insolvency, or any form of default.

(ii) Customer; financial institution

The terms "customer" and "financial institution" have the same meanings as in section 6809 of this title.

(8) Ability of consumer to dispute information directly with furnisher

(A) In general

The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly prescribe regulations that shall identify the circumstances under which a furnisher shall be required to reinvestigate a dispute concerning the accuracy of information contained in a consumer report on the consumer, based on a direct request of a consumer.

(B) Considerations

In prescribing regulations under subparagraph (A), the agencies shall weigh—

(i) the benefits to consumers with the costs on furnishers and the credit reporting system;

(ii) the impact on the overall accuracy and integrity of consumer reports of any such requirements;

(iii) whether direct contact by the consumer with the furnisher would likely result in the most expeditious resolution of any such dispute; and

(iv) the potential impact on the credit reporting process if credit repair organizations, as defined in section 1679a(3) of this title, including entities that would be a credit repair organization, but for section 1679a(3)(B)(i) of this title, are able to circumvent the prohibition in subparagraph (G).

(C) Applicability

Subparagraphs (D) through (G) shall apply in any circumstance identified under the regulations promulgated under subparagraph (A).

(D) Submitting a notice of dispute

A consumer who seeks to dispute the accuracy of information shall provide a dispute notice directly to such person at the

address specified by the person for such notices that—

(i) identifies the specific information that is being disputed;

(ii) explains the basis for the dispute; and

(iii) includes all supporting documentation required by the furnisher to substantiate the basis of the dispute.

(E) Duty of person after receiving notice of dispute

After receiving a notice of dispute from a consumer pursuant to subparagraph (D), the person that provided the information in dispute to a consumer reporting agency shall—

(i) conduct an investigation with respect to the disputed information;

(ii) review all relevant information provided by the consumer with the notice;

(iii) complete such person's investigation of the dispute and report the results of the investigation to the consumer before the expiration of the period under section 1681i(a)(1) of this title within which a consumer reporting agency would be required to complete its action if the consumer had elected to dispute the information under that section; and

(iv) if the investigation finds that the information reported was inaccurate, promptly notify each consumer reporting agency to which the person furnished the inaccurate information of that determination and provide to the agency any correction to that information that is necessary to make the information provided by the person accurate.

(F) Frivolous or irrelevant dispute

(i) In general

This paragraph shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including—

(I) by reason of the failure of a consumer to provide sufficient information to investigate the disputed information; or

(II) the submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the person or through a consumer reporting agency under subsection (b) of this section, with respect to which the person has already performed the person's duties under this paragraph or subsection (b) of this section, as applicable.

(ii) Notice of determination

Upon making any determination under clause (i) that a dispute is frivolous or irrelevant, the person shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the person.

(iii) Contents of notice

A notice under clause (ii) shall include—

(I) the reasons for the determination under clause (i); and

(II) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(G) Exclusion of credit repair organizations

This paragraph shall not apply if the notice of the dispute is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in section 1679a(3) of this title, or an entity that would be a credit repair

organization, but for section 1679a(3)(B)(i) of this title.

(9) Duty to provide notice of status as medical information furnisher

A person whose primary business is providing medical services, products, or devices, or the person's agent or assignee, who furnishes information to a consumer reporting agency on a consumer shall be considered a medical information furnisher for purposes of this subchapter, and shall notify the agency of such status.

(b) Duties of furnishers of information upon notice of dispute

(1) In general

After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall—

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person

furnished the information and that compile and maintain files on consumers on a nationwide basis; and

(E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1), for purposes of reporting to a consumer reporting agency only, as appropriate, based on the results of the reinvestigation promptly—

(i) modify that item of information;

(ii) delete that item of information; or

(iii) permanently block the reporting of that item of information.

(2) Deadline

A person shall complete all investigations, reviews, and reports required under paragraph (1) regarding information provided by the person to a consumer reporting agency, before the expiration of the period under section 1681i(a)(1) of this title within which the consumer reporting agency is required to complete actions required by that section regarding that information.

(c) Limitation on liability

Except as provided in section 1681s(e)(1)(B) of this title, sections 1681n and 1681o of this title do not apply to any violation of—

(1) subsection (a) of this section, including any regulations issued thereunder;

(2) subsection (e) of this section, except that nothing in this paragraph shall limit, expand, or otherwise affect liability under section 1681n or 1681o of this title, as applicable, for violations of subsection (b) of this section; or

(3) subsection (e) of section 1681m of this title.

(d) Limitation on enforcement

The provisions of law described in paragraphs (1) through (3) of subsection (c) of this section (other than with respect to the exception described in paragraph (2) of subsection (c) of this section) shall be enforced exclusively as provided under section 1681s of this title by the Federal agencies and officials and the State officials identified in section 1681s of this title.

(e) Accuracy guidelines and regulations required

(1) Guidelines

The Federal banking agencies, the National Credit Union Administration, and the Commission shall, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title, and in coordination as described in paragraph (2)—

(A) establish and maintain guidelines for use by each person that furnishes information to a consumer reporting agency regarding the accuracy and integrity of the information relating to consumers that such entities furnish to consumer reporting agencies, and update such guidelines as often as necessary; and

(B) prescribe regulations requiring each person that furnishes information to a consumer reporting agency to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A).

(2) Coordination

Each agency required to prescribe regulations under paragraph (1) shall consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such entity are consistent and comparable with the regulations prescribed by each other such agency.

(3) Criteria

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall—

(A) identify patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies;

(B) review the methods (including technological means) used to furnish information relating to consumers to consumer reporting agencies;

(C) determine whether persons that furnish information to consumer reporting agencies maintain and enforce policies to assure the accuracy and integrity of information furnished to consumer reporting agencies; and

(D) examine the policies and processes that persons that furnish information to consumer reporting agencies employ to conduct reinvestigations and correct inaccurate information relating to consumers that has been furnished to consumer reporting agencies.

§ 1681t. Relation to State laws

(a) In general

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State—

(1) with respect to any subject matter regulated under—

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall

not apply to any State law in effect on September 30, 1996;

(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply—

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);

(G) section 1681g(e) of this title, relating to information available to victims under section 1681g(e) of this title;

(H) section 1681s-3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes; or

(I) section 1681m(h) of this title, relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title

9, Vermont Statutes Annotated (as in effect on September 30, 1996);

(3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 1681g of this title, or subsection (f) of section 1681g of this title relating to the disclosure of credit scores for credit granting purposes, except that this paragraph—

(A) shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on December 4, 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);

(B) shall not apply with respect to sections 5-3-106(2) and 212-14.3-104.3 of the Colorado Revised Statutes (as in effect on December 4, 2003); and

(C) shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit based insurance score of a consumer by any person engaged in the business of insurance;

(4) with respect to the frequency of any disclosure under section 1681j(a) of this title, except that this paragraph shall not apply—

(A) with respect to section 12-14.3-105(1)(d) of the Colorado Revised Statutes (as in effect on December 4, 2003);

(B) with respect to section 10-1-393(29)(C) of the Georgia Code (as in effect on December 4, 2003);

(C) with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on December 4, 2003);

(D) with respect to sections 14-1209(a)(1) and 14-1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on December 4, 2003);

(E) with respect to section 59(d) and section 59(e) of chapter 93 of the General Laws of Massachusetts (as in effect on December 4, 2003);

(F) with respect to section 56:11-37.10(a)(1) of the New Jersey Revised Statutes (as in effect on December 4, 2003); or

(G) with respect to section 2480e(a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on December 4, 2003); or

(5) with respect to the conduct required by the specific provisions of—

(A) section 1681c(g) of this title;

(B) section 1681c-1 of this title;

(C) section 1681c-2 of this title;

(D) section 1681g(a)(1)(A) of this title;

(E) section 1681j(a) of this title;

(F) subsections (e), (f), and (g) of section 1681m of this title;

(G) section 1681s(f) of this title;

(H) section 1681s-2(a)(6) of this title; or

(I) section 1681w of this title.

(c) "Firm offer of credit or insurance" defined

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a(l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) of this section do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996.

APPENDIX F

Selected Provisions of the California Consumer Credit Reporting Agencies Act, Cal. Civ. Code §§ 1785.1-1785.36

Section 1785.25. Incomplete, inaccurate or disputed information; Closed or delinquent accounts information

(a) A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate.

(b) A person who (1) in the ordinary course of business regularly and on a routine basis furnishes information to one or more consumer credit reporting agencies about the person's own transactions or experiences with one or more consumers and (2) determines that information on a specific transaction or experience so provided to a consumer credit reporting agency is not complete or accurate, shall promptly notify the consumer credit reporting agency of that determination and provide to the consumer credit reporting agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the consumer credit reporting agency complete and accurate.

(c) So long as the completeness or accuracy of any information on a specific transaction or experience furnished by any person to a consumer credit reporting agency is subject to a continuing dispute between the affected consumer and that person, the person may not furnish the information to any consumer credit reporting agency without also including a notice that the information is disputed by the consumer.

(d) A person who regularly furnishes information to a consumer credit reporting agency regarding a consumer who has an open-end credit account with that person, and which is closed by the consumer, shall notify the consumer credit reporting agency of the closure of that account by the consumer, in the information regularly furnished for the period in which the account is closed.

(e) A person who places a delinquent account for collection (internally or by referral to a third party), charges the delinquent account to profit or loss, or takes similar action, and subsequently furnishes information to a credit reporting agency regarding that action, shall include within the information furnished the approximate commencement date of the delinquency which gave rise to that action, unless that date was previously reported to the credit reporting agency. Nothing in this provision shall require that a delinquency must be reported to a credit reporting agency.

(f) Upon receiving notice of a dispute noticed pursuant to subdivision (a) of Section 1785.16 with regard to the completeness or accuracy of any information provided to a consumer credit reporting agency, the person that provided the information shall (1) complete an investigation with respect to the disputed information and report to the consumer credit reporting agency the results of that investigation before the end of the 30-business-day period beginning on the date the consumer credit reporting agency receives the notice of dispute from the consumer in accordance with subdivision (a) of Section 1785.16 and (2) review relevant information submitted to it.

(g) A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with those provisions.

Section 1785.31. Damages

(a) Any consumer who suffers damages as a result of a violation of this title by any person may bring an action in a court of appropriate jurisdiction against that person to recover the following:

> **(1)** In the case of a negligent violation, actual damages, including court costs, loss of wages, attorney's fees and, when applicable, pain and suffering.

(2) In the case of a willful violation:

(A) Actual damages as set forth in paragraph (1) above;

(B) Punitive damages of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) for each violation as the court deems proper;

(C) Any other relief that the court deems proper.

(3) In the case of liability of a natural person for obtaining a consumer credit report under false pretenses or knowingly without a permissible purpose, an award of actual damages pursuant to paragraph (1) or subparagraph (A) of paragraph (2) shall be in an amount of not less than two thousand five hundred dollars ($2,500).

(b) Injunctive relief shall be available to any consumer aggrieved by a violation or a threatened violation of this title whether or not the consumer seeks any other remedy under this section.

(c) Notwithstanding any other provision of this section, any person who willfully violates any requirement imposed under this title may be liable for punitive damages in the case of a class action, in an amount that the court may allow. In determining the amount of award in any class action, the court shall consider among relevant factors the amount of any actual damages awarded, the frequency of the violations, the resources of the violator and the number of persons adversely affected.

(d) Except as provided in subdivision (e), the prevailing plaintiffs in any action commenced under this section shall be entitled to recover court costs and reasonable attorney's fees.

(e) If a plaintiff brings an action pursuant to this section against a debt collector, as defined in subdivision (c) of Section 1788.2, and the basis for the action is related to the collection of a debt, whether issues relating to the debt collection are raised in the same or another proceeding, the debt collector shall be entitled to recover reasonable attorney's fees upon a finding by the court that the action was not brought in good faith.

(f) If a plaintiff only seeks and obtains injunctive relief to compel compliance with this title, court costs and attorney's fees shall be awarded pursuant to Section 1021.5 of the Code of Civil Procedure.

(g) Nothing in this section is intended to affect remedies available under Section 128.5 of the Code of Civil Procedure.

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(5)

No. 09-1142

IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A., PETITIONER,

v.

JOHN C. GORMAN, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 5, 2010

QUESTIONS PRESENTED

1. Whether a furnisher's failure to report consumer debt as "disputed" upon completion of a required investigation under § 1681s-2(b)(1)(A) of the Fair Credit Reporting Act ("FCRA") can render the information incomplete or inaccurate in violation of Section 1681s-2(b).

2. Whether the rights and remedies created by Cal. Civ. Code § 1785.25(a) are preempted by the FCRA?

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INTRODUCTION

Petitioner FIA Card Services, N.A. (formerly known as "MBNA" and referred to in this litigation as "MBNA") urges this Court to review two questions: (1) whether, when the validity of a debt is disputed by a consumer, the failure of the furnisher of the credit information to report the debt as "disputed" renders the information incomplete or inaccurate under the FCRA; and (2) whether the remedies provisions of Cal. Civ. Code § 1785.25 are preempted by the FCRA. Neither question is remotely certworthy. Indeed, the petition does not allege the existence of a circuit split as to either question. And the second question is deficient in that the issue of conflict preemption was not even properly raised or decided below, and therefore is not preserved for review by this Court.

The first question, regarding the obligation of a credit furnisher to report information as "disputed," is a narrow question of statutory interpretation unworthy of this Court's review. The petition is at best a plea for error correction, but the appellate court's ruling on that question does not break new ground and is correct on the merits. At the very least, this Court should await a circuit split or some evidence that petitioner's hyperbolic predictions of dire harm to the U.S. banking system are more than imaginary.

The second question presented concerns whether the remedies provisions of Cal. Civ. Code § 1785 are preempted by the FRCA. Yet MBNA's conflict preemption argument was not timely advanced

below. MBNA raised this argument for the first time in its unsuccessful petition for rehearing *en banc*. As such, the issue was never briefed or argued on the merits. Indeed, the court of appeals expressly noted that "MBNA did not advance this contention before us initially, so the argument is waived." Pet. App. 57, n.35. Because "that question was not raised in the Court of Appeals," it is "not properly before [this Court]." *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

STATEMENT

This is basically a glorified small claims case. It involves a dispute over several hundred dollars in credit card charges that were posted by MBNA to Gorman's VISA account in 2002 for the purchase of what turned out to be used and defective satellite television equipment and installation services. Gorman timely disputed the charges. The merchant eventually acknowledged that the goods were defective and that Gorman's dispute was meritorious, yet MBNA refused to remove the charges. It began reporting Ge[illegible]s account to the three major CRAs as "delinquent."

Gorman contacted Experian, TransUnion, and Equifax to dispute the accuracy of the reported charges. The CRAs notified MBNA of Gorman's dispute, thereby triggering a duty under the FCRA to conduct a reasonable investigation and correct any inaccuracies. MBNA confirmed that the information it had previously transmitted was accurate without notifying the CRAs that Gorman had been consistently disputing the validity of the charges.

1. The Facts. Gorman's complaint alleges causes of action for libel, violation of Cal. Civ. Code § 1785.25(a), intentional failure to correct inaccurate credit information in violation of 15 U.S.C. § 1681n of the FCRA, and negligent failure to correct inaccurate credit reporting in violation of 15 U.S.C. § 1681o.

MBNA was granted summary judgment as to all claims. The district court concluded that Gorman had failed to raise a genuine issue of material fact as to whether MBNA had violated the FCRA. Similarly, the district court granted summary judgment as to the state court libel claim based on a lack of evidence that MBNA acted with malice. Lastly, the district court concluded that Gorman's claim for violation of Cal. Civ. Code § 1785.25 was preempted by the FCRA. Gorman appealed.

The district court's decision was affirmed in part and reversed in part by the Ninth Circuit. The Ninth Circuit affirmed the decision as it pertained to the claims for libel and under the FCRA for failure to conduct a reasonable investigation after being notified of Gorman's dispute by the CRAs. However, the Ninth Circuit found that Gorman could proceed with a FCRA claim on the basis that MBNA's failure to report that Gorman disputed the validity of the charges rendered the information that it had reported incomplete or inaccurate in violation of FCRA § 1681s-2(b). The court did not hold that failure to report a dispute per se automatically renders the information inaccurate, but rather that it could render the information inaccurate where the consumer had lodged a bona fide dispute. This result

is both logical and in accord with the conclusion reached by the Fourth Circuit. *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142 (4th Cir. 2008). It is also consistent with the Fifth Circuit's view that credit information may be incomplete or inaccurate under the FCRA if it is misleading and would be expected to adversely impact credit decisions. *Sepulvado v. CSC Credit Services, Inc.*, 158 F.3d 890, 895 (5th Cir. 1998).

As for the preemption issue, the Ninth Circuit concluded that Gorman could sue under California law because the enforcement provisions of Cal. Civ. Code § 1785.25 go along with Cal. Civ. Code § 1785.25(a) (a state statute that Congress *expressly* chose not to preempt).

The Ninth Circuit issued its decision on January 12, 2009. On October 21, 2009, it denied MBNA's request for rehearing *en banc* and issued a modified opinion. The modified opinion addressed MBNA's attempt to raise a conflict preemption argument for the first time on application for rehearing *en banc*. The Ninth Circuit observed that this argument had been waived but went on to discuss a number of reasons for finding the argument unpersuasive.

2. **Statutory Background.** The FCRA was adopted in 1970 based upon a congressional finding that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1). As a consumer-protection statute, the FCRA is to be

liberally construed.

The original 1970 statute regulated only credit reporting agencies. The FCRA was amended in 1996 to create rules for persons or entities that furnish information to credit reporting agencies ("CRAs").

Section 1681s-2 sets out two general obligations for persons furnishing credit information. Essentially, § 1681s-2(b) imposes a duty to investigate and modify disputed credit information when the request to do so is received from a CRA. The duty does not exist when the request to fix credit information is received from the affected consumer.

Only accurate credit information is to be reported by a credit furnisher. Among other things, "A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A). Section 1681s-2(a)(3) adds that: "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by the consumer, the person *may not* furnish the information to any consumer reporting agency *without notice that such information is disputed by the consumer*." (Emphasis added).

There is no private right of action for breach of a credit furnisher's duty to provide accurate information to a credit reporting agency in the first instance. However, if a consumer notifies a credit reporting agency that his or her credit report

contains inaccurate information, the credit reporting agency is obligated to ask the credit furnisher to reinvestigate the matter and make sure that the information it has reported is fully true and correct. This second set of duties that relate to the obligations of persons furnishing credit information once notified that the subject of that information disputes its accuracy is found in subsection (b): "After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency," the furnisher must conduct an investigation into the dispute and rectify any error. 15 U.S.C. § 1681s-2(b)(1). If this is not done, the consumer is afforded a private right of action against the furnisher of the credit information.

The 1996 amendments included language clarifying that Congress did not intend to amend or alter existing legal rights established by state law except those that are fundamentally "inconsistent" with federal law:

> This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1681t(a)

Additionally, the 1996 amendments added a provision at 15 U.S.C. § 1681t(b)(1)(F) generally preempting state requirements and prohibitions with respect to subject matter regulated under section 1681s-2. However, Congress carefully carved out exemptions for more than ten state statutes, including exempting California Civil Code § 1785.25(a) and a similar Massachusetts statute. 15 U.S.C. § 1681t(b)(1)(F)(ii).

It was only after several members of Congress expressed strong anti-preemption sentiment and the legislation was re-worked to preserve the California and Massachusetts statutes that the 1996 amendments to the FCRA were passed.

California Civil Code § 1785.25 is part of the California Consumer Credit Reporting Agencies Act ("CCRAA"), a 1975 statute designed to "require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for ... information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." Cal. Civ. Code § 1785.1(c). Section 1785.25(a) recites that a "person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate."

Section 1785.25(g) provides a private remedy for a

violation: "A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with this section, unless the furnisher establishes by a preponderance of the evidence that, at the time of the failure to comply with this section, the furnisher maintained reasonable procedures to comply with these provisions." Cal. Civ. Code § 1785.31 codifies the remedies available to a consumer whose credit has been damaged by a violation of § 1785.25(a).

In 15 U.S.C. § 1681t of the FCRA, Congress expressly included a provision that preserved Cal. Civ. Code § 1785.25(a). 15 U.S.C. § 1681t(b)(1)(F)(ii) recites that the preemptive effect of § 1681s-2 of the FCRA "relating to the responsibilities of persons who furnish information to consumer reporting agencies" does not apply "with respect to section 1785.25(a) of the California Civil Code." Nothing in the legislative history of the 1996 FCRA amendments suggests that in preserving § 1785.25(a), Congress intended to *sub silento* strip away the remedies set forth in § 1785.31. When Congress decided not to preempt § 1785.25(a), it concluded that furnishers of credit information should be required to comply with both the FCRA and § 1785.25(a).

REASONS FOR DENYING THE WRIT

I. NEITHER QUESTION PRESENTED IMPLICATES A CIRCUIT SPLIT

No circuit split exists regarding either question presented. Petitioner does not even try to point to a split of authority between the Ninth Circuit *and any*

other court—let alone a federal circuit court—concerning the holding that a credit furnisher must report whether adversely reported credit information is "disputed" or "not disputed" by the affected consumer.

As to the preemption issue, MBNA argues that the Ninth Circuit is in conflict with a small number of district-court decisions. In a footnote, MBNA lists four district-court decisions from Massachusetts, together with district-court decisions from California.

The California district-court decisions present no conflict, as they have been superseded by *Gorman*.[1] Nor does the existence of less than a handful Massachusetts district-court decisions create a conflict among circuits.

Petitioner also argues that the Ninth Circuit's decision has diverged from California state decisions. To support this argument, petitioner cites three California Court of Appeal cases. *Liceaga v. Debt Recovery Solutions, LLC*, 2009 Cal. LEXIS 4272 (2009), is the most recent of the three. Yet the California Supreme Court has depublished *Liceaga* and left intact *Sanai v. Saltz*, 170 Cal. App. 4th 746 (2009), a decision that *concurs* with the Ninth Circuit's preemption ruling. Consequently, California state jurisprudence is fully in accord that the rights and remedies created by §§ 1785.25(g) and

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[1] All but one of the California district court cases relied on *Lin v. Universal Card Services Corp.*, 238 F. Supp. 2d 1147 (N.D. Cal. 2002) or relied on other cases that relied on *Lin*. The district judge in *Lin* was the same district judge who presided over this case.

1785.31 are not preempted.

With regard to *Equifax Services, Inc. v. Cohen*, 420 A2d 189 (Me 1980), cited by petitioner, that court's discussion is based solely on a highly perfunctory and ill-reasoned implied conflict preemption analysis (an argument that has been waived by MBNA). Further, the case was decided many years before the 1996 amendments to the FCRA.

Unless and until a split of circuit authority exists, there is no legitimate basis at this juncture for consideration by the U.S. Supreme Court. This Court should wait until another circuit has squarely confronted at least one of the issues presented.

II. THE FIRST QUESTION PRESENTED IS A NARROW QUESTION OF STATUTORY INTERPRETATION THAT DOES NOT MERIT REVIEW BY CERTIORARI

There is nothing unusual or controversial about the Ninth Circuit's holding that a furnisher's failure to report that a debt is disputed can render the information incomplete or inaccurate under section 1681s-2(b) of the FCRA. The decision is correct on the merits and does not diverge from the precedent of any other circuit.

In petitioner's view, this case merits review by the Supreme Court because: 1) reporting accounts as "disputed" is costly; 2) the reporting requirement is superfluous and of no benefit to consumers; and 3) petitioner hypothesizes that the Ninth Circuit's interpretation will deter furnishers from reporting

any information at all, thereby inflicting great harm on the banking system and the economy as a whole. These arguments fail as a basis for seeking certiorari.

First, petitioner argues (without benefit of evidentiary support in the record) that the automated system used to process the majority of consumer disputes does not provide a mechanism for reporting a consumer account as disputed and that compliance with the Ninth Circuit's ruling will place an undue burden on furnishers to update their systems. This bald assertion is rather surprising given that furnishers have for many years been required to report an account's status as "disputed" or "undisputed" under § 1681s-2(a)(3).[2] Moreover, furnishers also have an obligation to report credit card charges as "disputed" under 12 C.F.R. § 226.13 promulgated pursuant to the Truth in Lending Act. Petitioner's argument that it should not be required to comply with its obligation to accurately report whether negative credit information is disputed by a consumer is hardly a proposition that should be the subject of serious debate, let alone one that merits review by this Court.

Second, petitioner argues that the requirement under § 1681s-2(a)(3) to report information as disputed is superfluous since CRAs already know of

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[2] "If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by the consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer." 15 U.S.C. § 1681s-2(a)(3).

the existence of a dispute. Congress did not agree. As petitioner admits, lenders rely heavily on the accuracy of consumer credit reports. A credit report becomes misleading when a furnisher fails to report that it is and has been aware that an account is disputed by the consumer.

Petitioner's argument is misguided. It is potentially significant from the standpoint of a credit provider whether the consumer disputed the validity of the claimed debt with the original credit provider. Normal credit information can appear on a person's credit report for up to seven years. A person who disputed credit card charges or other charges when they were first posted to his or her account may be a much different person with regard to how he or she manages credit from someone who does nothing, then at a much later time demands that negative information appearing on his or her credit report be removed. Accordingly, when a furnisher reports an account as disputed, it is not merely "echoing back" information known to the CRA. Rather, the furnisher is communicating important information about the consumer to potential lenders. This reality explains the obligation that Congress has imposed on furnishers in section 1681s-2(a)(3), which benefits not only consumers but prospective lenders as well.

The Ninth Circuit relied upon *Saunders v. Branch Banking & Trust Company of Virginia*, 526 F.3d 142, 148 (4th Cir. 2008), which concluded that a private right of action exists under § 1681s-2(b) based on a furnisher's failure to report negative account information as "disputed":

> The FCRA requires furnishers to determine whether the information that they previously reported to a CRA is "incomplete or inaccurate." § 1681s-2(b)(1)(D) (emphasis added). In so mandating, Congress clearly intended furnishers to review reports not only for inaccuracies in the information reported but also for omissions that render the reported information misleading. Courts have held that a credit report is not accurate under FCRA if it provides information in such a manner as to create a materially misleading impression.

Saunders rejected the defendant credit furnisher's contention that Congress had exempted furnishers of information from private liability by placing the initial obligation to report "disputes" in subsection (a): "No court has ever suggested that a furnisher can excuse its failure to identify an inaccuracy when reporting pursuant to § 1681s-2(b) by arguing that it should have already reported the information accurately under § 1681s-2(a)." *Id.* at 149-50. Where there is evidence that a furnisher is aware that the negative account information it is reporting is subject to a bona fide dispute, the existence of the dispute must be reported to the CRAs. *Id.* at 150.

The Ninth Circuit's ruling also cited *Dalton v. Capital Associated Industries, Inc.*, 257 F.3d 409, 415-16 (4th Cir. 2001), for the proposition that a consumer's failure to pay a debt that is disputed "does not reflect financial irresponsibility" and that

the failure to report the existence of a dispute can render the information being reported sufficiently misleading so as to be "incomplete or inaccurate" within the meaning of the FCRA. Pet. App. 33a.

A similar conclusion was reached in *Alexander v. Moore & Associates, Inc.*, 553 F. Supp. 948, 954 (D. Haw. 1982)(summary judgment granted based on a finding that the defendants had violated the FCRA by not attaching a statement of dispute to the file of the plaintiff consumer)(recognizing that if negative account information is "relevant to a consumer's fiscal responsibility and for that reason included in a consumer report, a dispute of such information tending to negate a conclusion of financial irresponsibility is likewise relevant").

Third, there is no evidence to support petitioner's argument that the Ninth Circuit's decision will have an undue chilling effect on furnishers. Petitioner posits that the entire banking system will suffer if the opinion is allowed to stand yet supports this argument with nothing more than reference to an amicus brief submitted in support of petitioner's request for rehearing en banc by the National Association of Screening Agencies ("NASA"). Credit reporting has not ground to a halt since the Ninth Circuit's decision was issued.

In short, the FCRA mandates that credit providers accurately report information. There is nothing unusual or burdensome about this part of the decision. *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 663 (7th Cir. 2001)(congressional objective underlying the FCRA is "to assure maximum

possible accuracy of the information contained in a consumer's credit report."). Petitioner's argument that the Ninth Circuit's decision will cause grave harm to our banking system is without merit and does not justify grant of the pending petition.

III. THE SECOND QUESTION PRESENTED PERTAINING TO PREEMPTION WAS NEITHER PROPERLY RAISED NOR DECIDED BELOW

MBNA's petition asks this court to review whether the FCRA expressly or impliedly preempts a California statute allowing for private enforcement Cal. Civ. Code § 1785.25(a), which pertains to the obligations of furnishers to CRAs. MBNA raised this argument for the first time in its petition for rehearing *en banc*. The question presented, therefore, is not properly before this Court.

The Ninth Circuit noted this omission:

> On petition for rehearing en banc, MBNA raises for the first time an argument that allowing private enforcement of California Civil Code Section 1785.25(a) is inconsistent with the purpose of the FCRA and thus is preempted under both FCRA § 1681t(a) and ordinary conflict preemption provisions. MBNA did not advance this contention before us initially, so the argument is waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Pet. App. 57a n.35. To be sure, the Ninth Circuit did append a footnote to its opinion reciting that it would not have been persuaded by MBNA's argument "[e]ven if we were to entertain [it]," but that is not the same as actually "entertain[ing]" the argument.

Because the issue was not briefed or argued on the merits or squarely decided by the court below, it is not properly before this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); Eugene Gressman, et al., *Supreme Court Practice* 464 -65 (9th ed. 2007).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 09-1142

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In The

Supreme Court of the United States

FIA CARD SERVICES, N.A., PETITIONER,

v.

JOHN C. GORMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Andrew M. Smith, Peter Gilbert & Scott Johnson, *Fair Credit Reporting Act Update—2009*, 65 BUSINESS LAWYER 595 (Feb. 2010) 9

REPLY BRIEF FOR PETITIONER

Although respondent describes this as a "glorified small claims case" (Br. in Opp. 2), his complaint seeks more than $350,000 in compensatory damages against petitioner, as well as punitive and statutory penalties, for alleged violations of Section 1681s-2(b) of the Fair Credit Reporting Act ("FCRA") and California Civil Code Section 1785.25. Dt. Ct. Dkt. 41 at 8-9.

The decision below has ramifications far beyond this case. Indeed, since the Ninth Circuit's decision, dozens of suits for compensatory and punitive damages, including class actions, have been filed against furnishers of information for alleged violations of Section 1681s-2(b) of FCRA with regard to unreported disputes,[1] alleged violations of California Civil Code

[1] *Morales v. Equifax, Inc.*, No. 2:09-CV-5687 (C.D. Cal. filed Aug. 4, 2009); *Brown v. Experian Info. Solutions, Inc.*, No. 2:09-CV-5545 (C.D. Cal. filed July 29, 2009); *Mendum v. Nationwide Relocation Servs., Inc.*, No. 2:09-CV-5329 (C.D. Cal. filed July 22, 2009); *McBrayer v. Experian Info. Solutions, Inc.*, No. 2:09-CV-3072 (C.D. Cal. filed May 1, 2009); *Tanner v. Financial Asset Mgm't Sys., Inc.*, No. 2:09-CV-1490 (C.D. Cal. filed Mar. 3, 2009); *Lund v. Road Runner Collection Servs., Inc.*, No. 37-2010-00088839 (Cal. Super. Ct. filed Mar. 30, 2010); *Augustine v. Road Runner Collection Servs., Inc.*, No. 37-2009-00104584 (Cal. Super. Ct. filed Dec. 23, 2009).

Section 1785.25,[2] or both.[3] Those complaints are now all colorable because of the Ninth Circuit's decision in

[2] *Bernard v. CitiMortgage, Inc.*, No. 2:10-CV-1331 (E.D. Cal. class action compl. filed May 28, 2010); *Marseglia v. JP Morgan Chase Bank*, No. 3:09-CV-2857 (S.D. Cal. filed Feb. 17, 2010); *Silverstein v. Wachovia Mtg. Corp.*, No. 3:09-CV-2938 (S.D. Cal. filed Feb. 12, 2010); *Hamberg v. JP Morgan Chase Bank*, No. 3:09-CV-2860 (S.D. Cal. filed Feb. 5, 2010); *Thompson v. Chase Bank USA, N.A.*, No. 3:09-CV-2143 (S.D. Cal. filed Dec. 28, 2009); *Chaconas v. JP Morgan Chase Bank*, No. 3:09-CV-2479 (S.D. Cal. filed Dec. 11, 2009); *Soler v. Chase Bankcard Servs.*, No. 2:09-CV-7736 (C.D. Cal. filed Nov. 18, 2009); *Bae v. JPMorgan Chase & Co.*, No. 8:09-CV-1127 (C.D. Cal. filed Nov. 13, 2009); *Sun v. Countrywide Home Loans, Inc.*, No. 2:09-CV-7695 (C.D. Cal. filed Oct. 22, 2009); *Narraway v. American Express Bank, FSB*, No. 3:09-CV-1279 (N.D. Cal. filed Sept. 1, 2009); *De la Garza v. Washington Mut. Mtg.*, No. 3:09-CV-390 (S.D. Cal. 3d am. compl. filed May 1, 2009); *Nafarrete v. Bank of Am., N.A.*, No. 30-2010-00374917 (Cal. Super. Ct. filed May 24, 2010); *Schraner v. Lone Star Ass'n Mgmt., Inc.*, No. 37-2010-00088607 (Cal. Super. Ct. filed Mar. 25, 2010); *Spears v. GE Money Bank*, No. 30-2010-00344855 (Cal. Super. Ct. filed Feb. 16, 2010); *Cruz v. Midland Credit Mgmt., Inc.*, No. 37-2010-00085318 (Cal. Super. Ct. filed Feb. 11, 2010); *Palestini v. Homecomings Fin., LLC*, No. 37-2010-00084628 (Cal. Super. Ct. filed Jan. 29, 2010); *Martinez v. Wells Fargo Bank*, No. 37-2009-00104297 (Cal. Super. Ct. filed Dec. 21, 2009); *Holmes v. AT&T Commc'ns of Cal., Inc.*, No. 37-2009-00101182 (Cal. Super. Ct. class action compl. filed Oct. 26, 2009); *James v. Chase Bank USA, N.A.*, No. 3:08-CV-2220 (Cal. Super. Ct. 2d am. compl. filed Oct. 20, 2009); *Rutan v. JP Morgan Chase Bank*, No. 37-2009-00060845 (Cal. Super. Ct. filed Oct. 13, 2009), *removed*, No. 3:09-CV-2617 (S.D. Cal.) (Nov. 19, 2009).

[3] *Woods v. Experian Info. Solutions, Inc.*, No. 3:10-CV-2669 (N.D. Cal. filed June 18, 2010); *Elmore v. Federal Credit Corp.*, No. 3:10-CV-2639 (N.D. Cal. filed June 16, 2010); *Quist v. Bank of Am., N.A.*, No. 3:10-CV-1118 (N.D. Cal. filed Mar. 16, 2010); *Yasar v. Rickenbacker Grp., Inc.*, No. 3:10-CV-922 (N.D. Cal. filed

(Continued on following page)

this case. The Ninth Circuit held that Section 1681s-2(b) extends to a furnisher's failure to "echo back" disputes to a consumer reporting agency ("CRA") and that the private right of action to enforce California Civil Code Section 1785.25 is not preempted by FCRA in suits against furnishers.

It is the threat of just such suits that led Congress to limit the federal cause of action against furnishers and to preempt state causes of action. Congress was concerned that the fear of monetary liability from such suits (and the costs of the litigation itself) would make furnishers unwilling to voluntarily provide information to the Nation's banking and lending system. As reflected by the three amicus briefs supporting this Court's review, the Ninth Circuit's contrary ruling thwarts that intent and threatens the efficient extension of credit.

I. REVIEW IS NECESSARY BECAUSE THE DECISION BELOW IS OF NATIONAL IMPORTANCE, WILL HARM THE INTEGRITY OF CREDIT INFORMATION, AND REQUIRE COSTLY, FRUITLESS CHANGES TO THE CREDIT REPORTING SYSTEM

A. Respondent challenges (Br. in Opp. 1, 14-15) whether the Ninth Circuit's decision will discourage furnishers from providing critical credit information to the CRAs, and thereby injure the integrity of the

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Mar. 4, 2010); *Gomes v. Rickenbacker Grp., Inc.*, No. 5:09-CV-3190 (N.D. Cal. filed July 14, 2009); *Paysinger v. Santander Consumer USA Inc.*, No. 2:09-CV-1107 (C.D. Cal. filed Feb. 17, 2009).

credit system. But those intimately involved in the system disagree with respondent and perceive the immediate harm caused by the Ninth Circuit's decision.

First, the trade association for the CRAs, the Consumer Data Industry Association ("CDIA"), urges this Court to review and reverse the Ninth Circuit's decision. It does so even though the CRAs are not potential defendants under the causes of action recognized by the Ninth Circuit. As CDIA explains, the entire consumer reporting system is dependent on voluntary participation by furnishers, and the Ninth Circuit's decision will cause furnishers to stop providing information to the CRAs. CDIA Amicus Br. 6-7. CDIA also explains that such omissions will lead to less accurate and less complete credit reports, and describes why that is so. *Id.* at 7, 22-23.

Second, the California Apartment Association ("CAA"), which represents landlords who rent nearly two million housing units in California, observes that the Ninth Circuit's decision will deter its members from reporting unpaid rent to the CRAs. CAA Amicus Br. 3, 11-12. This will, the CAA explains, make credit records incomplete and require landlords to adopt other, more overinclusive, means of screening tenants. *Id.* at 2-3, 10-11, 13. It also will require landlords to charge the maximum security deposit in order to protect themselves against delinquencies, which will significantly increase the initial costs of renting an apartment. *Id.* at 12-13. That amicus brief confirms the views below of the National Association of Screening Agencies (Pet. 19) that an entire

swath of furnishers may stop providing information to the CRAs in light of the Ninth Circuit's decision.

Finally, the American Bankers Association ("ABA") and California Bankers Association ("CBA"), whose members are both furnishers and users of credit information, stress that a "single national standard for enforcing credit reporting obligations is essential." ABA/CBA Amicus Br. 2. They note that this is particularly true because all major financial institutions do business in California and thus will need to comply with the more onerous requirements or face California courts and juries. *Id.* at 12-13.

B. Respondent also contests (Br. in Opp. 11) that the automated system used to process over 80% of consumer disputes will need to be changed in light of the Ninth Circuit's ruling. Pet. 20-21. He suggests that the existing system must have a code permitting the furnisher to note that information has been disputed *to the CRA* by the consumer, because furnishers already have an obligation under Section 1681s-2(a)(3) of FCRA to report that information has been disputed *to the furnisher* by the consumer.

But that does not follow. The Ninth Circuit's decision reads into FCRA a new obligation requiring furnishers to report back to the CRAs that the consumer has disputed *to the CRAs* the completeness or accuracy of information. There is no existing code for such a notation in the automated system. Pet. 21; ABA/CBA Amicus Br. 9. And it is not feasible for individual furnishers to make additional "free form" entries. *Ibid.*

C. This same confusion infects respondent's response (Br. in Opp. 11-12) to petitioner's argument that requiring furnishers to "echo back" dispute information to the CRAs—the very entities that transmitted the dispute to the furnishers in the first instance—is superfluous. Section 1681s-2(a)(3), which requires that the furnisher tell the CRAs when information "is disputed to the person [*i.e.*, the furnisher] by the consumer," is not superfluous because it requires furnishers to report to the CRAs information that they do not know: that the consumer has lodged a dispute with the furnisher. Moreover, that obligation is not privately enforceable; only state and federal officials may enforce that requirement. 15 U.S.C. § 1681s-2(c) & (d). It is only the new "echo back" requirement that the Ninth Circuit read into Section 1681s-2(b) that is superfluous because it tells the CRAs nothing that they do not already know. And the Ninth Circuit has not only created that requirement out of whole cloth, but it also has made it privately enforceable.

Respondent suggests (Br. in Opp. 12) that a potential credit provider is more likely to grant credit if the credit report shows that the consumer promptly disputed the information with the furnisher. But the codes used by the automated system do not reflect the date that the consumer initially disputed the information, which would be essential to knowing whether a dispute was "prompt." If a consumer wants potential credit providers to know the date of his dispute, the consumer (not the furnisher) must invoke his

statutory right to file a statement of dispute under Section 1681i and identify the date in his statement. If the consumer files such a statement of dispute with the CRA, that statement must be noted in all subsequent reports containing the disputed information. 15 U.S.C. § 1681i(b). Thus, petitioner is wrong to suggest that the requirement created by the Ninth Circuit is not superfluous.

II. THE NINTH CIRCUIT'S EXPANSION OF PRIVATE DAMAGES ACTIONS AGAINST FURNISHERS IS CONTRARY TO CONGRESSIONAL INTENT AND WARRANTS REVIEW

A. Respondent Offers No Cogent Support In FCRA For Recognizing A Private Action For Failing To "Echo Back" A Dispute To A CRA

The Ninth Circuit's reading of Section 1681s-2 of FCRA is contrary to Congress's purpose and is in tension with the views reflected in the joint rulemaking of six federal agencies.

Congress imposed no statutory duties on furnishers for the first 26 years following FCRA's enactment. In 1996, Congress amended FCRA to define a narrow set of furnisher responsibilities, including a requirement that if the "completeness or accuracy of any information" is disputed to the furnisher by a consumer, the furnisher "may not furnish the information to any [CRA] without notice that such

information is disputed by the consumer." 15 U.S.C. § 1681s-2(a)(3).

Importantly, even with these amendments, Congress continued to insulate furnishers from all private rights of action relating to the alleged inaccuracy or incompleteness of any information furnished to the CRAs. The furnisher's obligation to furnish accurate information to the CRAs, and to correct and update any previously furnished information that is determined to be inaccurate or incomplete, is "enforced exclusively * * * by the Federal agencies and officials and the State officials indentified in section 1681s." *Id.* § 1681s-2(d). Yet the Ninth Circuit's decision authorizes a private cause of action precisely in situations where Congress chose to provide none.

Respondent's effort to support the Ninth Circuit's holding (Br. in Opp. 6) relies on Section 1681s-2(b)(1) of FCRA. But that section has nothing to do with reporting the existence of a consumer dispute to the CRAs. Rather, it relates only to the accuracy and completeness of the underlying credit information that the consumer has disputed to the CRA. Pet. 24. Nothing in Section 1681s-2(b) requires furnishers to notify the CRAs of consumer disputes or authorizes the private action that the Ninth Circuit allowed.

The Ninth Circuit's decision is also unworkable. It holds that furnishers are liable under Section 1681s-2 only if the failure to report a dispute is "materially misleading." Pet. App. 35a. According to the Ninth Circuit, a furnisher cannot be held liable

"simply for a failure to report that a debt is disputed." Pet. App. 34a. But there is no way for a furnisher to know, ex ante, whether a report of a dispute would be relevant to a potential creditor. *See* Andrew M. Smith, Peter Gilbert & Scott Johnson, *Fair Credit Reporting Act Update—2009*, 65 BUSINESS LAWYER 595, 603 (Feb. 2010).

It is for this reason that six federal agencies refused to adopt a similar standard for imposing duties on furnishers. Pet. 25-26; ABA/CBA Amicus Br. 5-8. Respondent offers no response to this determination by expert agencies of the real-world infeasibility of the Ninth Circuit's standard.

B. Respondent Offers No Substantive Response To Petitioner's Argument That FCRA's Preemption Provisions Preclude The State Law Private Rights Of Action Permitted Below

Respondent contends (Br. in Opp. 1-2, 15-16) that petitioner waived its preemption arguments. Respondent is mistaken. Respondent elides the two different preemption arguments pressed in the petition, ignores the actual decision of the court of appeals, and provides no defense of the Ninth Circuit's actual holdings. In the short time since issuance of that erroneous decision, the holding that FCRA does not preempt California's cause of action in California Civil Code Section 1785.31 for compensatory and punitive damages to enforce California Civil Code Section 1785.25 has prompted dozens of such suits,

including class actions, against furnishers. *See supra*, pages 1-2 nn.2 & 3.

1. Contrary to respondent's assertion (Br. in Opp. 15), the issue of express preemption is plainly preserved. The district court held that Section 1681t(b)(1)(F) of FCRA expressly preempted respondent's state private right of action in California Civil Code Section 1785.31 to enforce California Civil Code Section 1785.25, Pet. App. 94a-96a; petitioner as appellee defended that holding on appeal, Pet. App. 53a, 55a; and the court of appeals reversed, Pet. App. 57a.

Respondent offers no defense of the Ninth Circuit's holding on the merits. Instead, he simply paraphrases (Br. in Opp. 4) the Ninth Circuit as holding that the separately codified private cause of action in California Civil Code Section 1785.31 "go[es] along" with the unpreempted substantive requirement in California Civil Code Section 1785.25. And he claims (Br. in Opp. 8) that nothing in *the legislative history* suggests that Congress intended to preempt the remedies.

In so doing, respondent ignores the breadth of the express preemption provision. *See* Pet. 27-30; CDIA Amicus Br. 14-18. FCRA preempts any state law "respect[ing]" the "subject matter regulated" under Section 1681s-2(a). 15 U.S.C. § 1681t(b)(1)(F). And Section 1681s-2 regulates not only the furnisher's duty to furnish accurate and complete information to the CRAs, it also governs who may enforce

that duty. The plain language of Section 1681t(b)(1)(F) thus preempts state law remedies to enforce furnishers' duties.

Further, until the decision below, no other court had ever held that Section 1681t(b)(1)(F) of FCRA did not preempt state rights of action, and numerous courts had held that it did preempt such actions. Pet. 33-34. Indeed, the Ninth Circuit's holding conflicts with the First Circuit's affirmance of a judgment dismissing as preempted a private cause of action to enforce a similarly-saved Massachusetts statute. *See Gibbs v. SLM Corp.*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005). There, the district court reasoned that Section 1681t(b)(1)(F) did not save the private right of action. *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1 (D. Mass. 2004). In an unpublished disposition, the First Circuit affirmed the district court "essentially for the reasons stated in its published opinion." 2005 WL 5493113, at *1. This prior consensus, and the Ninth Circuit's divergence from it, takes on special significance because Congress amended Section 1681t(b) in 2003 but did not alter its scope. CDIA Amicus Br. 18.

2. The related preemption argument—that the private right of action in California Civil Code Section 1785.31 is subject to conflict preemption—is also properly before this Court.

The Ninth Circuit devoted six paragraphs to rejecting the conflict preemption argument that petitioner raised as appellee to defend the district court's judgment. Pet. App. 57a-59a n.35. Respondent

attempts to discount the discussion as merely "reciting that [the Ninth Circuit] would not have been persuaded by [petitioner's] argument" if it had entertained it. Br. in Opp. 16. But the decision is framed in terms of a holding, not contingent musings. The Ninth Circuit states, for example, that the legislative history "supports *our holding* concerning the scope of the FCRA preemption provisions." Pet. App. 59a n.35 (emphasis added). In any event, the issue was "passed upon below," and is thus preserved for review. *United States v. Williams*, 504 U.S. 36, 41 (1992).

Respondent appears to acknowledge (Br. in Opp. 10) a split between the Ninth Circuit's decision and the Maine Supreme Court on the question of conflict preemption. But he suggests that the Maine Supreme Court's decision could be affected by FCRA's 1996 amendments. Contrary to respondent's claim (Br. in Opp. 6-7), Section 1681t(a) was neither added nor substantively amended in 1996. FCRA has contained that same preemptive language since its enactment in 1970, *see* Fair Credit Reporting Act, Pub. L. No. 91-508, § 622, 84 Stat. 1114, 1136 (1970), and the provision was merely renumbered as a subsection in 1996. Thus, respondent is wrong in contending (Br. in Opp. 6-7) that Congress in 1996 "clarifl[ied]" that Section 1681t(a) of FCRA does not preempt state law, and in suggesting that the Ninth Circuit's decision does not conflict with the Maine Supreme Court. If Congress had sought to eliminate normal rules of conflict preemption, it could have

made that clear, as it has in a number of other related statutes. Pet. 32.

Permitting California money damages claims against furnishers is in conflict with FCRA. Congress sought to encourage participation by furnishers in the consumer reporting process by ensuring a nationally uniform private enforcement regime. If left standing, the Ninth Circuit's decision will defeat that objective by subjecting furnishers to a multitude of consumer claims like the one at issue here.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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AUGUST 17, 2010

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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April 2010

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BRIEF OF AMERICAN BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States.[1] ABA has

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[1] This brief is filed with the written consent of Petitioner and Respondent. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and CBA and their members, made a monetary contribution to the preparation or submission of the brief.

members in each of the fifty states and the District of Columbia. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States.

The California Bankers Association ("CBA") is a non-profit trade association established in 1981 that represents most of the FDIC-insured depository financial institutions in the State of California. CBA's members range in size from small community banks to the largest banks in the country.

Many of the members of ABA and CBA (collectively the "Associations") issue credit cards and most of them provide some form of consumer credit. In addition, most, if not all, of the Associations' members report some form of consumer information to credit reporting agencies ("CRAs"), as part of the national credit reporting system established by the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (the "FCRA"). The Associations are filing this brief to emphasize that a single national standard for enforcing credit reporting obligations is essential to the health of the banking and consumer lending system.

The Associations frequently appear in litigation as a party or amicus where the issues raised in a case are of widespread importance and concern to the industry. The Associations are authorized to pursue their members' interests in representing them before this Court to urge review of this case of great importance to the financial services industry.

SUMMARY OF THE ARGUMENT

This case warrants review. The ruling of the court below – requiring that voluntary furnishers of information to CRAs ("furnishers") "echo back" to a CRA that the information that a furnisher has provided to a CRA is disputed in response to a notification from a CRA that the very same information is disputed – undermines the central purposes of the FCRA. *See infra* Part I. The ruling departs from the 2009 federal regulations and guidance issued by the six federal agencies charged by Congress with interpreting the very same section of the statute construed by the court below. *See infra* Part I.A. Further, the Ninth Circuit's opinion will have far-reaching consequences for the national automated credit dispute process but will provide very little benefit to consumers who already have the option to place their own notice of dispute on a consumer report directly with the CRA. *See infra* Part I.B.

The Ninth Circuit acknowledges that it has reached a "different conclusion" from the First Circuit regarding whether the FCRA's preemption clause preempts state-law causes of action for state-law standards saved from preemption by the FCRA preemption clause at issue. *See infra* Part II; Pet. App. 52a. Under the law prevailing in the First Circuit, only federal and state officials may enforce the "saved" state standard. *See infra* Part II. Under the Ninth Circuit's ruling below, any private party may do so. *See id.* Because only two state-law standards are saved by the FCRA preemption clause at issue, there are unlikely to be future occasions for courts outside the First and Ninth Circuits to review

and pass upon this issue. Review by this Court is warranted given the size and importance of the California financial services market and its substantial effect on the national credit dispute process. *See id.*

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE NINTH CIRCUIT'S HOLDING THAT THE FCRA REQUIRES FURNISHERS TO "ECHO BACK" A DISPUTED CHARGE UNDERMINES THE "FAIR AND ACCURATE CREDIT REPORTING" AT THE CENTER OF THE STATUTE.

Congress enacted the FCRA to ensure "fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). The credit reporting regime established by the FCRA ensures fair treatment both to consumers and to those who voluntarily furnish credit information to CRAs ("furnishers"). In 15 U.S.C. § 1681s-2, Congress specified the "responsibilities of furnishers" to CRAs. In that section, Congress set forth detailed duties of furnishers (1) to provide information free from errors; (2) to correct and update consumers' information; (3) to provide notices of dispute; (4) to provide notices of closed accounts; and (5) to provide notices of delinquent accounts. These requirements are not subject to private enforcement; instead, they may only be enforced by federal and state officials. *See id.* § 1681s-2(c), (d).

Private enforcement is permitted regarding the "duties of furnishers" "upon notice of dispute."

Id. § 1681s-2(b). This provision charges furnishers with the responsibility, "[a]fter receiving notice . . . of a dispute with regard to the completeness or accuracy of any information provided by a person to a [CRA]" to "conduct an investigation with respect to the disputed information;" to "review all relevant information provided by the [CRA] . . . .;" to "report the results of the investigation" to the CRA; and "if the investigation finds that the information is incomplete or inaccurate, [to] report those results to all other [CRAs] to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis." *Id.*

It is this last requirement of Section 1681s-2(b) that Respondent seeks to enforce via a private action against Petitioner. *See* Pet. App. 34a. The court below held that this section requires the furnisher to "echo back" to the CRA that the account is disputed in response to the CRA's notification that the account is disputed. *See id.* The Ninth Circuit's ruling not only is in divergence from the relevant federal agencies' recent construction of this very section of FCRA, it is also at odds with the purposes of the FCRA, and introduces great disruption into the standardized credit dispute systems that the industry has adopted to comply with FCRA's credit dispute requirements.

A. The Ninth Circuit's "Echo Back" Ruling Departs From Six Federal Agencies' 2009 Regulations Interpreting FCRA.

The Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal

Reserve System ("Fed"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), the National Credit Union Administration ("NCUA"), and the Federal Trade Commission ("FTC") have been jointly charged by Congress to "establish and maintain guidelines for use by each person that furnishes information to a [CRA] regarding the accuracy and integrity of the information relating to consumers that such entities furnish to [CRAs]," and to "prescribe regulations requiring each person that furnishes information to a [CRA] to establish reasonable policies and procedures for implementing the guidelines" to be issued by the six federal agencies. 15 U.S.C. § 1681s-2(e)(1).

On July 1, 2009, the six federal agencies issued guidelines and regulations as required by Section 1681s-2(e). Final Rule, 74 Fed. Reg. 31484 (July 1, 2009). In doing so, the agencies, among other things, required that "[e]ach furnisher must establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency." *E.g.*, 12 C.F.R. § 41.42(a).

In defining "accuracy" and "integrity" of furnisher information regarding consumers to CRAs, the agencies expressed concern that "it could be difficult or impossible for furnishers to predict what information third parities would find relevant or material . . . ." 74 Fed. Reg. at 31490.

Accordingly, the agencies rejected part of their proposed guidance that would have had the effect of imposing a "material omission" burden on the

furnishers of information. *See id.* In light of the comments to the proposed rule, the agencies decided that it was not appropriate to impose this "unworkable standard" on voluntary furnishers of information. *Id.* Though the agencies, in their final rule, "retain[ed] [a] 'material omission' concept" in the accuracy and integrity guidelines and regulations, they expressly decided to do so "in a manner *that does not place the burden of making that determination on furnishers.*" *Id.* (emphasis added).

Instead, the agencies' regulations "place the burden of making that determination" on the agencies themselves, *id.* *See, e.g.*, 12 C.F.R. § 41.41(e)(3). And, in this regard, the final rule contemplates that the agencies will publish a list of such material omissions. *See, e.g.*, 74 Fed. Reg. at 31490. Currently, the only such listed material omission is a furnisher's failure to include information about a consumer's credit limit. *See id.*

In its expansion of private liability to enforce Section 1681s-2(b), *see* Pet. App. 29a-36a, the Ninth Circuit did not consider, or even cite, the six agencies' new guidance and regulations. But there is reason to believe that the decision below and the six agencies' new guidance and regulations diverge. For example, the Ninth Circuit's "echo back" holding results in private liability for furnishers for their "material omission" of a dispute notation by a consumer. Such a result places the "burden of making" a material omission determination on a furnisher, or on a court after-the-fact. The specter of private liability has the potential to fray or unravel the uniform standards that Congress sought to give

voluntary furnishers of information through the guidance and regulations promulgated pursuant to 15 U.S.C. § 1681s-2(e)(1). Clearly, the court below should have considered this most recent pronouncement of the six federal agencies charged by Congress with implementing the duties of furnishers specified in Section 1681s-2 before rendering a decision vastly expanding the scope of furnisher liability to private parties under FCRA.

Review by this Court is accordingly warranted to ensure harmony between the lower court's construction of the FCRA and the six federal agencies' newly prescribed guidelines and regulations governing the duties of furnishers of information to CRAs.

B. The Ninth Circuit's "Echo Back" Ruling Will Disrupt The National Automated Credit Dispute Process.

The credit dispute process is highly automated and standardized. CRAs and furnishers communicate dispute information to one another through "consumer dispute verification ('CDV') [and automated consumer dispute verification ('ACDVs')] form[s] based on the information the consumer provides." FTC and Board of Governors of the Federal Reserve System, *Report to Congress on the Fair Credit Reporting Act Dispute Process* 14 (Aug. 2006). "CRAs and furnishers also communicate through Universal Data Forms ('UDFs'). *Id.* These forms are standardized and utilize codes to summarize the consumer's dispute. *Id.* at 15.

In addition to the standardized forms, the industry has an electronic dispute processing system

to process these communications between CRAs and furnishers. "The system is web-based and permits furnishers to receive and send ACDVs, and [to] send [Automated Universal Data forms] AUDs, over the Internet." *Id.* "[M]ore than 83% of all disputes" were processed through the electronic system as of 2006. *Id.* The electronic system, like the forms it communicates, is highly dependent upon standardized reason codes and automation. *See id.*

The effect of the Ninth Circuit's ruling is to require that the furnisher "echo back" to the CRA that the account is disputed in response to the CRA's notification that the account is disputed. As the Petitioner points out, the industry's "automated systems, which have been developed over several years to accommodate FCRA's requirements, do not provide a mechanism for reporting an account as 'disputed' under FCRA when a furnisher reports the results of its investigation to the CRA . . . ." Pet. 21. Moreover, given the highly automated nature of the dispute process, it is not feasible, especially from a compliance standpoint, to require additional "free form" entries to this effect and attach them to the automated response. Instead, what is in effect required by the Ninth Circuit's ruling is a complete overhaul of the industry's automated systems. Such an effort would require the expenditure of significant resources to tell a CRA what it already knows: *i.e.*, that the account is in dispute.

By contrast, there is no harm to the consumer from not reporting the disputed account notation to the CRA in response to the CRA's initiation of a dispute process because the consumer is able to attach a notation of dispute to the credit report

directly through the CRA if he or she is not satisfied with the CRA's inquiry and the furnisher's response. *See* 15 U.S.C. § 1681i(b), (c). Accordingly, because of the nationwide impact and importance of the Ninth Circuit's decision on the national automated credit dispute system, this Court's review is warranted.

II. GIVEN THE IMPORTANCE OF THIS CASE TO THE FINANCIAL SERVICES INDUSTRY, THIS COURT SHOULD ADDRESS THE NINTH CIRCUIT'S ACKNOWLEDGED "DIFFERENT CONCLUSION" ON PREEMPTION THAN THAT REACHED BY THE FIRST CIRCUIT.

Section 1681t(b)(1)(F) preempts all state-law "requirement[s] or prohibition[s]" "with respect to any subject matter regulated under" "section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies." 15 U.S.C. § 1681t(b)(1)(F).

Two state laws are specifically saved from preemption by Section 1681t(b)(1)(F) – section 54A(a) of chapter 93 of the Massachusetts Annotated Laws, and section 1785.25(a) of the California Civil Code. These two state provisions consist solely of state-law standards governing the conduct of furnishers of information to CRAs. They do not also include private state-law causes of action to enforce those state-law standards.

As the court below acknowledged, Pet. App. 52a n.32, the Ninth Circuit has reached a "different conclusion" from the First Circuit – as well as every district court to have addressed the issue in

Massachusetts. The courts in the First Circuit have found that private state-law causes of action to enforce the standard set forth in section 54A(a) of Chapter 93 of the Massachusetts Annotated Law are "requirements or prohibitions" "with respect to the subject matter regulated under" "section 1681s-2". *See Gibbs v. SLM Corp.*, No. 05-1057, 2005 WL 5493113 (1st Cir. Aug. 23, 2005); *Islam v. Option One Mortgage Corp.*, 432 F. Supp. 2d 181, 185-86 (D. Mass. 2006); *Gibbs v. SLM Corp.*, 336 F. Supp. 2d 1, 12-13 (D. Mass. 2004). Further, finding that such state-law causes of action do not fall within the narrow scope of the savings clause, which saves only Section 54A(a), the courts in the First Circuit have found such private actions preempted by Section 1681t(b)(1)(F). *See, e.g., Islam*, 432 F. Supp.2d at 185-86; *Gibbs*, 336 F. Supp.2d at 12-13. Accordingly, under the construction of Section 1681t(b)(1)(F) prevailing in the First Circuit, the saved state-law standard may be enforced only by state and federal officials pursuant to 15 U.S.C. § 1681s(c)(1)(B).

By contrast, the Ninth Circuit ruling below held that private state-law causes are saved from preemption by Section 1681t(b)(1)(F). *See* Pet. App. 51a-52a. Specifically, the lower court rejected the "district court's analysis [that the private enforcement actions found outside the saved state statute are preempted] would . . . lead to the conclusion that Congress explicitly retained the portions of the California statutory scheme that create obligations, without leaving in place any enforcement mechanism. That would be an unlikely result at best." *Id.* In a footnote, the Ninth Circuit rejected Petitioner's argument that the FCRA's

enforcement provisions in 15 U.S.C. § 1681s(c) provide specifically for state enforcement of the relevant state-law standard. *See id.* at 57a n.37.

In addition, the Ninth Circuit broke from the law prevailing in the First Circuit by holding that private enforcement was not preempted because private state-law causes of action are not "requirements or prohibitions" within the meaning of Section 1681t(b)(1). *See* Pet. App. 52a. Accordingly, under the Ninth Circuit's ruling, the saved California-law standard of Cal. Civ. Code § 1785.25(a) may be enforced through California civil causes of action by private parties.

As a result, there is a divergence regarding whether Section 1681t(b)(1)(F)'s preemption of state law "requirements or prohibitions" includes state-law causes of action. Furthermore, because only two states' statutes are saved from preemption by Section 1681t(b)(1)(F), there are unlikely to be future occasions for courts outside the First and Ninth Circuits to review and pass upon this issue.

Resolution of this issue is important because, absent review by this Court, the furnishers that do business with California customers – essentially all major financial institutions – will be required to comply with more onerous requirements imposed by the prospect of private liability imposed by California courts and juries. California's banking industry accounts for almost 11 percent of all money deposited in financial institutions throughout the United States. *See* FDIC, *FDIC-Insured Institutions, State Totals as of June 30, 2008*, (showing that nearly 763 billion of 7 trillion dollars nationwide are deposited in financial institutions in California). The

restoration of the uniform federal enforcement regime that Congress created therefore depends on this Court's intervention.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the petition, the petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A.,

Petitioner,

v.

JOHN C. GORMAN,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA APARTMENT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER FILED WITH CONSENT OF ALL PARTIES

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BRIEF OF *AMICUS CURIAE*[1] CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER[2]

INTEREST OF *AMICUS CURIAE*

The California Apartment Association ("CAA") is the largest state-wide rental housing trade associations in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high quality rental housing in California. CAA has advocated on behalf of rental housing providers in legislative, judicial and other forums in California and nationally.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* discloses that counsel of record for all parties received notice *of amicus curiae's* intention to file this brief eight days prior to the due date; however, despite the inadvertent late notice from *Amicus*, counsel for all parties have consented to the filing of this *amicus* brief.

Under certain circumstances, landlords may be responsible for violations of the federal Fair Credit Reporting Act ("FCRA"), and the California Consumer Credit Reporting Agencies Act ("CCRAA"), either as furnishers of consumer credit information or under an agency theory when a landlord contracts with an entity such as a collection agency which in turn reports information furnished by the landlord to a credit reporting agency ("CRA").

The term "furnisher" is not specifically defined in either the FCRA or the CCRAA. In fact, the only definition of "furnisher" is contained in relatively new regulations promulgated by the FDIC on July 1, 2009, which are effective on July 10, 2010. In those regulations, "furnisher" is defined to mean "an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report." 12 C.F.R. § 334.40. Even where a landlord or other entity does not furnish information directly to a CRA, but to an intervening collection agency which then reports the information to the CRA, under general agency law, if the collection agency violates the FCRA or the CCRAA while acting within the scope of its contractual duties for a landlord, the landlord may be liable for the violations. See Chang v. Verizon New England, Inc., 595 F.3d 26, 32 (1st Cir. 2010).

As such, it is of paramount importance to CAA and its members that this Court grant review in order to repeal the additional private rights of action for consumers against furnishers of information judicially created by the Ninth Circuit in its decision.

In addition, the multi-family housing industry throughout this country is dependent upon the voluntary furnishing of credit information. CAA submits this brief as *amicus curiae* in support of Petitioner in order to bring to the Court's attention the potentially devastating effects on the credit reporting system which likely will result from the Ninth Circuit's unprecedented expansion of the private rights of action a consumer may bring against furnishers of information. While CAA is in support of review of the other issues presented by Petitioner as well, this chilling effect alone compels a grant of review by this Court.

SUMMARY OF ARGUMENT

Most landlords rely on credit reports as part of the tenant screening process in an effort to select responsible tenants who are likely to fulfill their contractual obligations. As discussed herein, without meaningful credit information, landlords will implement stricter screening criteria which will

make it more difficult for many individuals to qualify for safe and stable rental housing. In addition, the less reliable the tenant screening process, the higher a landlord's cost of doing business, resulting in higher rents for all residents.

The decision of the Ninth Circuit Court of Appeals will have a substantial chilling effect on the willingness of landlords and other furnishers of consumer credit information to report bad debts and similar information to credit reporting agencies because of the substantially increased risk of costly litigation. While the amounts of delinquent accounts may vary significantly among residential landlords, generally the amounts of the delinquencies reported are relatively small and pale in comparison to the cost of defending even a frivolous lawsuit. Even though landlords benefit from reporting tenant defaults when screening, as reasonable business people, they likely will elect not to report the consumer information rather than run the risk of expensive litigation. This reluctance to report accurate information will render credit reports meaningless, since the reports will be woefully incomplete, thus impacting the cost and availability of rental housing.

As set forth herein, CAA respectfully urges

this Court to grant the Petition for Writ of Certiorari in order to (1) reverse the impermissible expansion of private rights of action of consumers against furnishers of information, and (2) determine there are no private rights of action against furnishers of information outside the specific mandates of the federal statute.

ARGUMENT

I. This Court Must Undo the Ninth Circuit's Judicial Expansion of Private Rights of Action for Consumers Against Furnishers of Consumer Credit Information.

A. Private Rights of Action Under CCRAA §§ 1785.25(g) and 1785.31 are Preempted by the FCRA.

As Petitioner argued in its Petition for Writ of Certiorari ("Petition"), numerous federal courts consistently have found the Fair Credit Reporting Act ("FCRA"), codified at 15 U.S.C. § 1681 *et seq.*, preempts private enforcement of the California Consumer Credit Reporting Agencies Act ("CCRAA"), codified at California Civil Code § 1785.1 *et seq.* [Petition, pp. 33-35]. Despite the consistent interpretation of the statutes by many federal

courts[3], the Ninth Circuit Court of Appeals erroneously found in this case that a consumer can bring a private right of action against a furnisher of information pursuant to Sections 1785.25(g) and 1785.31 of the CCRAA "because the plain language of the preemption provision does not apply to private rights of action and because the likely purpose of the express exclusion was precisely to permit private enforcement of these provisions. . . ." Gorman v. Wolpoff & Abramson, LLP; MBNA America Bank., N.A., 552 F.3d 1008, 1032 (9th Cir. 2009).

As to the plain language of the preemption provision, contrary to the conclusions of the Ninth Circuit, the preemption provisions apply to both Sections 1785.25(g) and 1785.31. The FCRA provides, in pertinent part, that:

> (b) *General exceptions*. No requirement or prohibition may be imposed under the laws of any State
>
> (1) with respect to any subject matter regulated under

[3] The specific case citations are set forth in the Petition at pp. 33-35 and are not repeated herein.

> (F) section 623 [§ 1681s-2], relating to the responsibility of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply
>
> . . .
>
> (ii) **with respect to section 1785.25(a)** of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996); . . . .

15 U.S.C. § 1681t(b)(1)(F) (emphasis added). Only Section 1785.25(a) is saved from preemption under the express language of 15 U.S.C. § 1681t(b)(1)(F). In fact, neither Section 1785.25(g) nor Section 1785.31 are even mentioned in the preemption exclusion. As such, it was an inappropriate exercise of judicial legislation for the Ninth Circuit to expand the existing preemption language to include these provisions. Courts must be reluctant to expand narrow, specific exceptions into broad preemption provisions into general savings clauses.

As to the likely purposes of Congress, the Ninth Circuit's current interpretation is contrary to its previous observations with respect to the intent of Congress. In addressing another issue under the FCRA, the Ninth Circuit observed:

> It can be inferred from the structure of the statute that ***Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished.*** Hence, Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental bodies.

Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060 (9th Cir. Nev. 2002) (emphasis added) (also recognizing the specifically permitted private rights of action under 1681s-2(b)).

The Ninth Circuit's recent decision is at odds with the congressional purpose it specifically acknowledged in Nelson: "*Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished.*" Nelson, 282 F.3d at 1060 (emphasis added). Unfortunately, the result of the

current decision, unless rectified by this Court, is to thwart this recognized Congressional purpose to preempt private causes of action against furnishers of information. Furnishers of credit information are now exposed to suit by any and every consumer dissatisfied with the credit information reported under the CCRAA.

B. The Obligation to Notify CRAs of a Dispute is Imposed by Section 1681s-2(a), not 1681s-2(b); Therefore, Consumers Do Not Have a Private Right of Action Against Furnishers of Credit Information for Failing to Report Back to a CRA that the Consumer Disputes the Information.

In its decision, the Ninth Circuit recognized that Section 1681s-2(a)(3) of the FCRA requires furnishers to report that a consumer disputes the accuracy of credit information under the circumstances identified in the statute. Gorman, 552 F.3d at 1022. The Ninth Circuit also conceded that only federal or state officials have the authority to bring claims under 15 U.S.C. § 1681s-2(a). Id. In order to create a consumer private cause of action under the circumstances presented, the Ninth

Circuit then found "a disputed credit file that lacks a notation of dispute may well be 'incomplete or inaccurate' within the meaning of the FCRA, and the furnisher has a privately enforceable obligation to correct the information after notice. § 1681s-2(b)(1)(D)." Gorman, 552 F.3d at 1024. Essentially, the Ninth Circuit transferred the requirements for reporting a dispute that are set forth in 1681s-2(a)(3) into 1681s-2(b)(1)(D) in order to create a privately enforceable obligation even though there is nothing in Section 1681s-2(b) that requires a furnisher to report a dispute to a CRA. Once again, the Ninth Circuit is expanding impermissibly the scope of 1681s-2(b) and exposing furnishers of information to litigation that Congress intended to avoid and that will have a chilling effect on voluntary reporting of consumer credit information.

II. The Ninth Circuit's Decision Will Have a Detrimental Impact on Millions of Individuals Associated with the Multi-Family Housing Industry.

As stated above, most landlords rely on credit reports as a critical part of the tenant screening process in an effort to select responsible tenants who are likely to fulfill their contractual obligations. Accurate credit reports provide valuable information

for landlords to assess whether a particular individual is likely to pay rent on time and in full, abide by the rules of the apartment community and comply with the terms of rental agreements. Historically, applicants with several delinquent accounts do not pay their rent on time and do not perform under the lease. Further, individuals with bad credit are more inclined than individuals with good credit to skip out on a lease early leaving the landlord with bad debt and collection costs.

Landlords traditionally minimize their risk of bad debt and substantial collection costs by reviewing credit reports of potential tenants, which, until the Ninth Circuit's decision in Gorman, have been fairly reliable given the widespread reporting of information. While there is little value to a landlord or other entity to report a delinquent account or bad debt to a CRA since the individual has already failed to meet his or her obligations as to the reporting entity, the system is dependent upon all entities which extend credit furnishing the information voluntarily so that it is available for the next landlord or entity which is considering extending credit to the individual. If landlords or other entities stop reporting credit information because of a genuine fear that consumers will bring civil actions against them for reporting that information, then the

credit reporting system as a whole will fail because the information in the system will no longer give an accurate picture of anyone's credit-worthiness due to the decline in voluntary reporting.

Landlords as an industry already suffer under litigation tactics often employed by "dissatisfied" tenants, who know and understand the significant costs to the landlord of defending even frivolous claims. As a result, landlords generally make concerted efforts to foreclose any possibility of private civil litigation. Allowing consumers to privately enforce additional provisions of the FCRA and the CCRAA will have a devastatingly chilling effect on the reporting of information which, in turn, will have a detrimental effect not only on landlords, but also on renters as well.

Depending on the credit-worthiness of potential tenants, landlords are able to reduce security deposits, income requirements and prior rental history requirements. If fewer entities report consumer credit information, landlords will not have meaningful information on which to evaluate the credit-worthiness of applicants. As a result, CAA anticipates landlords will start charging the maximum security deposit allowed under the law in order to protect themselves against unanticipated

delinquencies or breaches of rental agreements. This can increase the initial costs of renting an apartment for consumers by an average of one to three thousand dollars depending on the area and the type of unit at issue.

CAA also anticipates many landlords will impose more stringent financial eligibility requirements if they are unable to meaningfully evaluate the credit-worthiness of an applicant. Most landlords in California require potential tenants to have gross income of two-and-a-half to three times the rent amount. If a landlord is not confident that delinquent accounts are being reported, they will be more concerned about whether a household has sufficient funds to meet its rental obligations and all other expenses. As a result, it is easy to envision many landlords requiring gross income as much as four to five times the rent before accepting an applicant. This higher income requirement will pose a particular hardship on moderate income tenants who will not be able to meet the higher income standard, but who otherwise may have been able to qualify for an apartment based upon their excellent credit-worthiness.

Degradation of the credit reporting system from the failure of a substantial number of entities

reporting credit information most likely also will cause landlords to increase rent levels for all tenants. If a landlord does not have a reliable means to check the credit-worthiness of a tenant, it is highly likely that it will lease apartments to more "bad" tenants, which will lead to higher bad debt costs and higher collection costs. As the cost of doing business for landlords increases, those costs are ultimately passed on to residents in the form of higher rent. As a result, good tenants will be paying higher rent because of the landlords' inability to screen out potentially bad tenants in advance.

Finally, if reliable credit information is not available, landlords will turn to other means of acquiring the information such as prior landlord references. This will make it much more difficult for students and other traditionally new residents to find suitable housing because many landlords will not be willing to take a chance on applicants without a proven rental record – and this is only one industry. CAA is confident similar changes will occur in all other industries which rely on credit reports to make fundamental business decisions.

The Ninth Circuit's decision has far-reaching implications well beyond the parties of the case. The judicial expansion of private causes of action can

have a devastating impact on the entire multi-family industry and CAA urges the Court to grant review to prevent such a result.

III. Failure of California Businesses to Voluntarily Report Consumer Credit Information Can Have a Devastating Effect Across the Country.

There is an old saying: "as goes California, so goes the Nation." While the issues addressed above primarily impact furnishers of information in California, what happens in California impacts the national economy. According to U.S. Department of Commerce estimates, California's Gross Domestic Product was slightly more than $1.8 trillion, which made California the world's eighth-largest economy in 2008. [U.S. Bureau of Economic Analysis]. Further, California is home to one in eight Americans and thus, not surprisingly, represents the single largest automobile and retail sales market in the country. If California businesses stop reporting credit information voluntarily, it is easy to imagine Californians will obtain less credit and consequently decrease their spending greatly impacting the economy well beyond the borders of California.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit presents issues with far-reaching implications. This Court must grant review in order to repeal the additional private rights of action for consumers against furnishers of information judicially created by the Ninth Circuit in its decision.

April 16, 2010 Respectfully Submitted,

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FIA CARD SERVICES, N.A.,

Petitioner,

v.

JOHN C. GORMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure:

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioner, FIA Card Services, N.A. (*hereinafter*, "FIA").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of

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[1] The parties were notified of CDIA's intention to file this brief within the time provided by Rule 37.2(a). All parties have consented to the filing of CDIA's *amicus* brief. The consent letters have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

consumer report information. In this role, CDIA participated in the efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and every subsequent amendment, including the 1996 amendments[2] that added the furnisher responsibility and preemption provisions that are the subject of FIA's petition.

CDIA's members' business depends upon the willingness of furnishers to voluntarily provide their consumer transaction data to CRAs. The risk of liability created by the Ninth Circuit Court of Appeals' decision threatens to deter furnishers from voluntarily providing their data and thereby threatens the integrity and value of the consumer report information CRAs provide to creditors and other users of consumer report information. For this reason, CDIA is vitally interested in the outcome of this case. Left unreviewed, the Ninth Circuit's decision: (i) upsets Congress' carefully-crafted, nationally-uniform regime for the enforcement of a furnisher's accuracy and completeness responsibilities; and (ii) fails to give effect to the FCRA's clear preemption of private rights of action against information furnishers based on the alleged inaccuracy or incompleteness of the information they provide to CRAs.

CDIA's decades-long central role in the consumer reporting industry, and participation in the process

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[2] *See*, The Consumer Credit Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 428 (1996).

leading to the FCRA's enactment and amendments, allows CDIA to provide the Court with a unique perspective on the consumer reporting industry's understanding of furnisher responsibilities under the FCRA, the availability of private rights of action against furnishers, and the preemption provisions at issue in this appeal. CDIA can also assist the Court as it considers the national impact of the Ninth Circuit's decision on the furnishers of consumer data who provide the essential information to CRAs that is used to produce the consumer reports used billions of times each year by millions of businesses in the United States.

SUMMARY OF ARGUMENT

Congress recognized the vital role played by CRAs nearly 40 years ago when it enacted the FCRA.[3] Essential to that role is the *voluntary* furnishing of billions of items of consumer data to CRAs each month by as many as 40,000 data furnishers,[4] resulting in the creation and maintenance of files on nearly 200

[3] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation).

[4] *Sarver v. Experian Information Solutions*, 390 F.3d 969, 972 (7th Cir. 2004) ("the company gathers information originated by approximately 40,000 sources").

million consumers, containing 2.6 billion tradelines.[5] This information is used more than 1.5 billion times each year by creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[6]

By making reliable data available to consumer report users, CRAs provide the information infrastructure that contributes to the soundness, safety and efficiency of employment, housing, insurance, banking, finance, retail credit and law enforcement systems in the United States. The entire consumer reporting system is dependent upon information furnishers' continued voluntary participation in the consumer reporting process. By ignoring the FCRA's plain language and holding that consumers may maintain a private right of action against information furnishers for the alleged furnishing of inaccurate information, the Ninth Circuit has ignored the FCRA express prohibition against such claims and the

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[5] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9, http://www.ftc.gov/reports/facta/041209factarpt.pdf.

[6] *Id.*; *Sarver*, 390 F.3d at 972; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003), http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf.

FCRA's express preemption of any state law that permits such claims.

The potential furnisher liability that could result from the court's decision will inhibit the furnishing of information to CRAs and will result in less accurate, less complete, and less predictive consumer reports. The potential harm to U.S. consumers and to the nation's economy is incalculable.

The Court should grant FIA's petition for writ of *certiorari* to restore the FCRA's nationally-uniform furnisher enforcement regime which incentivizes information furnishers to provide accurate information to CRAs while insulating them from the multitude of lawsuits that could result if private rights of action alleging the inaccurate furnishing of consumer information to CRAs were permitted.

ARGUMENT

CDIA agrees with, and joins in, the arguments of FIA. CDIA provides its *amicus* brief to discuss the need for this Court to review the Ninth Circuit's decision to give effect to FCRA preemption in light of the FCRA's requirement, under 15 U.S.C. § 1681s-2(a)(2), that furnishers update and correct previously furnished information that is determined to be inaccurate – an argument that is not addressed in FIA's brief. In addition, CDIA explains the harm to consumers, the users of consumer reports and CDIA's

member CRAs that will flow from the Ninth Circuit's decision if unreviewed.

I. THE NINTH CIRCUIT'S DECISION MUST BE REVIEWED TO RESTORE THE INCENTIVES THAT CONGRESS DEVELOPED TO ENCOURAGE FURNISHERS TO VOLUNTARILY PROVIDE THE CONSUMER INFORMATION THAT IS ESSENTIAL TO THE CONSUMER REPORTING SYSTEM.

The FCRA is the product of nearly 40 years of careful legislative development. It has been amended numerous times and now comprises 31 sections and over 23,000 words. Yet, its fundamental objectives remain unchanged. The FCRA was enacted to promote the efficiency of the banking system, meet the needs of commerce, and ensure that CRAs act "with fairness, impartiality, and respect for the consumer's right to privacy."[7] These objectives continue to guide the operations of each of CDIA's member CRAs. But the FCRA's objectives cannot be met solely through CRA diligence.

The consumer reporting system is dependent, in the first instance, on those businesses that provide information about consumers to the CRAs – the "furnishers." Their participation in the consumer

[7] 15 U.S.C. § 1681(a).

reporting system is *entirely voluntary*.[8] No federal or state law *requires* any creditor, insurer, employer, landlord or other business to furnish the information resulting from its consumer transactions to any CRA; yet all users of consumer report information seek the most accurate and complete information to inform their individualized assessments of the risk presented by a particular consumer.[9]

If the Ninth Circuit's decision is left unreviewed, furnishers across the nation will, out of concern for private lawsuits by perhaps thousands of consumers, stop voluntarily furnishing consumer information to CRAs. Consumer reports produced from less robust CRA file information will be less accurate, less complete, and therefore less predictive. The report user's resulting uncertainty concerning a consumer will lead to delays in decision-making and increased costs as users struggle to obtain more complete information from other sources. The costs associated with these delays and additional investigations will be passed along to the consumers who must wait for a decision concerning applications for credit, insurance, employment, housing or other benefits.

In drafting the FCRA, Congress recognized the essential role played by information furnishers. To

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[8] *See*, 16 C.F.R. Pt. 660, App. A ("The Commission encourages voluntary furnishing of information to consumer reporting agencies.")

[9] *See*, 15 U.S.C. § 1681b.

encourage their voluntary participation in the consumer reporting process, Congress imposed *no statutory duties* on furnishers for the first 26 years following the FCRA's enactment. In 1996, Congress amended the FCRA to define a narrow set of furnisher responsibilities,[10] some of which may be enforced through private consumer lawsuits under the FCRA.[11] Importantly, even with these amendments, Congress continued to insulate furnishers from *all private rights of action* relating to the alleged inaccuracy or incompleteness of any information furnished to the CRAs. The furnisher's obligation to furnish accurate information to the CRAs and to correct and update any previously furnished information that is determined to be inaccurate or incomplete is "enforced exclusively . . . by the Federal agencies and officials and the State officials identified in section 621 [15 U.S.C. § 1681s]."[12]

To further the FCRA's accuracy and completeness objectives, Congress added a dispute mechanism allowing consumers to challenge the accuracy and completeness of their furnisher-provided information *through the CRAs* and requiring furnishers to respond to those challenges through the same CRAs.[13]

[10] *See* 15 U.S.C. § 1681s-2 (added by Pub. L. No. 104-208, 110 Stat. 3009-426 (1996)).

[11] *See* 15 U.S.C. § 1681s-2(b).

[12] 15 U.S.C. §§ 1681s-2(c)&(d).

[13] 15 U.S.C. §§ 1681i(a)(2), 1681s-2(b). In 2003, the FCRA was amended to include specific furnisher obligations when a

(Continued on following page)

Congress also authorized governmental agencies, including the Federal Trade Commission ("FTC"), and the States' attorneys general, to bring enforcement actions against furnishers, obtain injunctive relief, and recover civil penalties of up to $2,500 per violation, and damages of up to $1,000, if an existing injunction was violated.[14] Any furnisher "who knows or has reasonable cause to believe" that the information it furnishes to CRAs is inaccurate or incomplete subjects itself to such enforcement actions.[15]

Under the FCRA's uniform enforcement regime, furnishers voluntarily participate in the consumer reporting system because they are confident that governmental authorities will not pursue frivolous inaccuracy and incompleteness claims against them and because the FCRA insulates them from *private* lawsuits alleging the inaccurate or incomplete furnishing of information to CRAs.

Now, nearly 40 years after the FCRA was enacted, over 40,000 furnishers voluntarily provide billions of pieces of information on consumers each month to CRAs that maintain files on over 200 million consumers and provide more than 1.5 billion

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consumer disputes the accuracy of consumer report information directly with the furnisher. 15 U.S.C. § 1681s-2(a)(8). The requirements, which become effective July 1, 2010, may not be enforced by a consumer through a private cause of action. 15 U.S.C. § 1681s-2(d) (referring to § 1681s-2(c)(1)).

[14] 15 U.S.C. §§ 1681s(a)(2)&(3), 1681s(c)(1)(iii).

[15] 15 U.S.C. §§ 1681s-2(a)(1)(A), 1681s-2(c)&(d).

consumer reports each year to consumer report users.[6]

It is Congress' careful balancing of furnisher incentives, consumer rights and governmental enforcement authority that has led to the development of the most accurate, complete and efficient consumer reporting system in the world -- a system now threatened by the Ninth Circuit's decision. By opening the door to potentially widespread private litigation against information furnishers, the Ninth Circuit's decision threatens the foundation of that system.

II. THE NINTH CIRCUIT'S DECISION THREATENS THE EFFICIENCY OF THE NATION'S CONSUMER REPORTING SYSTEM.

The Ninth Circuit's decision that the FCRA permits private California-law actions based on a furnisher's accuracy and completeness obligations errs in two independent ways. Such actions are preempted under FCRA §§ 1681t(a) and 1681t(b)(1)(F).

[6] *See*, FTC, 2004 *Report to Congress* at 8-9.

A. Private rights of action to enforce CCRAA § 1785.25(a) are inconsistent with the FCRA's nationally-uniform regime for enforcing furnisher responsibilities and are, therefore, preempted by FCRA § 1681t(a).

The Ninth Circuit's decision concedes that the FCRA prohibits *any* private claim to enforce the furnisher's accuracy and completeness obligations found in FCRA § 1681s-2(a),[17] but nonetheless holds that a California consumer may privately enforce essentially identical furnisher obligations found in the CCRAA (*see* comparative table below).[18]

FCRA § 1681s-2(a)(1)(A)
A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.
Cal. Civ. Code § 1785.25(a)
A person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate.

[17] *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1162 (9th Cir. 2009).

[18] *Id.* at 1172-73.

In its original decision, the Ninth Circuit recognized that it was creating a fatal inconsistency between federal and state law:

> The only *real inconsistency* arises between the *private* enforcement of California and Massachusetts statutes *and § 1681s-2(c) and (d), which prohibit private enforcement* of the obligations under § 1681s-2(a).[19]

According to the Ninth Circuit, this "inconsistency . . . did not offend the purported goal of uniformity of credit reporting obligations."[20] To be clear, the Ninth Circuit reached the contradictory conclusion that permitting a private lawsuit by a California consumer for a furnisher's alleged inaccurate or incomplete information furnishing does *not* offend the FCRA's national uniformity objective even though *no other State* permits such a claim and the FCRA expressly prohibits such private lawsuits.

Following FIA's petition for rehearing, the Ninth Circuit amended its decision to remove the concession that there was a "real inconsistency" between the private enforcement of the furnisher's accuracy obligations found in California CCRAA § 1785.25(a) and the prohibitions against private enforcement

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[19] *Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1032 (9th Cir. 2009).

[20] *Id.*

found in FCRA § 1681s-2(c) and (d).[21] The withdrawal of the concession does not remove the "real inconsistency." Moreover, even the amended decision remains contrary to the reasoned decisions of those courts that considered the same issue before the Ninth Circuit's decision.[22]

FCRA § 1681t(a) preempts *any state law* that is "inconsistent with *any* provision" of the FCRA.[23] FCRA §§ 1681s-2(c)(1)&(d) prohibits the private enforcement of a furnisher's accuracy and completeness responsibilities and the furnisher's duty to correct any previously furnished information that is determined to be inaccurate or incomplete.[24] The private enforcement of the same responsibilities under the CCRAA necessarily stands as an obstacle to the FCRA's nationally-uniform furnisher enforcement

[21] *Compare*, Gorman, 552 F.3d at 1032 *with Gorman*, 584 F.3d at 1172 (deleting the entire paragraph beginning with: "The only real inconsistency. . . .").

[22] *See, e.g., Lin v. Universal Card Servs. Corp.*, 238 F.Supp.2d 1147, 1152 (N.D. Cal. 2002) ("Provisions contained in the CCRAA that stand in conflict with the FCRA were, however, preempted. . . . These provisions [§ 1785.25(g) and § 1785.31] were not excepted from preemption, however, because they are *in*consistent [sic] with the enforcement scheme of Congress under § 1681s-2(d), in matters relating to furnishers of consumer credit information.").

[23] 15 U.S.C. § 1681t(a).

[24] 15 U.S.C. §§ 1681s-2(a)(1)&(2).

regime and is, therefore, preempted by FCRA § 1681t(a).[25]

Moreover, the FCRA's exclusive administrative enforcement of the furnisher accuracy and completeness responsibilities furthers – as the Ninth Circuit's decision does not – Congress' objective of incentivizing furnisher participation in the consumer reporting process by ensuring a nationally-uniform enforcement regime that protects furnishers from a multitude of consumer claims alleging the furnishing of inaccurate or incomplete information to CRAs. The Ninth Circuit's decision obstructs the achievement of this Congressional objective.

B. Private rights of action under CCRAA §§ 1785.25(g) and 1785.31 to enforce the furnisher accuracy and completeness responsibilities identified in CCRAA § 1785.25(a) are preempted by FCRA § 1681t(b)(1)(F).

In its decision, the Ninth Circuit had difficulty accepting the *breadth* of preemption provided by Congress under FCRA § 1681t(b)(1)(F) when it used the most all-encompassing language available to it – "any," "with respect to any," and "relating to" – as well

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[25] S. Rep. No. 104-185 at 55 (1994) ("By preempting state and local provisions relating to the subject matter regulated by these provisions of the FCRA, [§ 1681t] establishes the FCRA as the national uniform standard in these areas.")

as the *narrowness* of the exception to preemption Congress provided for when it identified only CCRAA *sub*section 1785.25(a), rather than all of section 1785.25, as being saved from preemption.[26]

FCRA § 1681s-2 regulates both the furnisher's duty to furnish accurate and complete information to the CRAs and who may enforce those duties. The FCRA's plain language preempts *any* state law "respecting" the furnisher's accuracy responsibilities (*i.e.*, a subject matter regulated under § 1681s-2(a)) and "relating" to the furnisher's responsibilities (*i.e.*, the duty, under § 1681s-2(a)(1)(A), to furnish accurate and complete information and, under § 1681s-2(a)(2), to correct previously furnished information that is determined to be inaccurate or incomplete).[27] The FCRA provides only for two specifically-defined narrow exceptions to the FCRA's broad subject matter preemption.[28]

The CCRAA's enforcement provisions, CCRAA §§ 1785.25(g) and 1785.31 – neither of which appear in the FCRA preemption exceptions[29] – provide for *private* rights of action by consumers to enforce a furnisher's accuracy and completeness responsibilities. These state law enforcement provisions necessarily "relate" to the accuracy and completeness subject

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[26] *Gorman*, 584 F3d 1170-71

[27] 15 U.S.C. § 1681t(b)

[28] 15 U.S.C. § 1681t(b)(1)(F)

[29] *Id.*

matter regulated by FCRA § 1681s-2 and are, therefore, preempted by the FCRA's plain language and no California consumer may privately enforce CCRAA § 1785.25(a) against a furnisher. Again, this is not a novel conclusion; rather, it is the holding of every court that considered the issue prior to the Ninth Circuit's decision.[30] The reasoning behind the Ninth Circuit's departure from this settled approach is not supported by the actual language of the FCRA or the CCRAA.

The Ninth Circuit reasons that, although the FCRA does not *actually* save CCRAA subsection 1785.25(g) and section 1785.31 from preemption, the FCRA does not need to because subsection 1785.25(g) imposes no "requirement or prohibition" – the words found at the beginning of the FCRA's subject matter preemption provision upon which the Ninth Circuit built decision. Rather, according to the Ninth Circuit, subsection 1785.25(g) and section 1785.31 merely

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[30] *Roybal v. Equifax*, 405 FSupp.2d 1177, 1181 n.5 (E.D. Cal. 2005); *accord Howard v. Blue Ridge Bank*, 371 FSupp.2d 1139, 1144 (N.D. Cal. 2005); *Lin v. Universal Card Services Corp.*, 238 FSupp.2d 1147, 1152 (N.D. Cal. 2002); *Buraye v. Equifax, et al.*, 2008 U.S. Dist. LEXIS 80732 *21-22 (C.D. Cal. 2008); *Drew v. Equifax Info. Servs.*, 2007 U.S. Dist. LEXIS 53157 *13-14 (N.D. Cal. 2007); *Hogan v. PMI Mortgage Ins. Co.*, 2006 U.S. Dist. LEXIS 32179 *35-36 (N.D. Cal. 2006); *Quigley v. Pennsylvania Higher Educ. Assistance Agency*, 200 U.S. Dist. LEXIS 19847 *8 (N.D. Cal. 2000); *Lacaga v. Debt Recovery Solutions, LLC*, 169 Cal.App.4th 901, 908 (2008), *rehearing denied*, (Jan. 20, 2000), *petition for review filed*, No. S170308 (Cal. Feb. 6, 2009).

provide "for additional avenues through which consumers can ensure compliance with the obligations Congress specifically meant to impose."[31] According to the Ninth Circuit, the CCRAA enforcement provisions are the California *alternative* to Congress' *exclusive* enforcement regime for all of the furnisher's obligations under the FCRA to furnish accurate information to the CRA and to update and correct previously furnished information that is determined to be inaccurate.[32]

For the Ninth Circuit, the fact that Congress expressly saved CCRAA *sub*section 1785.25(a) from preemption while *not even mentioning* subsection 1785.25(g) or section 1785.31 is of no importance. According to the Ninth Circuit, the "plain language" of the FCRA's preemption provision does not apply to these state enforcement provisions.[33] The Ninth Circuit concludes, in effect, that the same Congress that *specifically identified* CCRAA *sub*section 1785.25(a)

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[31] *Gorman*, 584 F.3d at 1172. Subsection 1785.25(g) does impose "requirements" upon furnishers. Under subsection 1785.25(g), a furnisher *is liable* for the failure to comply with any part of section 1785.25 "*unless the furnisher establishes by a preponderance of the evidence*, that at the time of the failure to comply . . . , the furnisher maintained reasonable procedures to comply with those provisions." Cal. Civ. Code § 1785.25(g) (emphasis added). To avoid liability, the furnisher is required to establish certain facts by a preponderance of the evidence. This requirement relates to the subject matter (*i.e.*, furnisher responsibilities) regulated by FCRA § 1681s-2.

[32] 15 U.S.C. §§ 1681s-2(c)(1)&(d).

[33] *Gorman*, 584 F.3d at 1171.

as being saved from subject matter preemption *chose to omit* any reference to *sub*section 1785.25(g) or section 1785.31.

To accept the Ninth Circuit's reasoning then, one must conclude that 7 years after subsection 1785.25(a) was saved from FCRA preemption by the 1996 amendments, when Congress substantially amended the FCRA in 2003, Congress did not amend the FCRA to clarify the scope of preemption under FCRA § 1681t(b)(1)(F) despite knowing that every court to have considered the question up to that time concluded that the FCRA *did, in fact, preempt private lawsuits* under the California law.[29] Those Massachusetts courts that have considered the same issue with respect to the nearly identical Massachusetts law that Congress also saved from preemption have reached similar conclusions.[30]

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[29] *See, supra*, n.24; *see also, Lavaga v. Debt Recovery Solutions, LLC*, 169 Cal.App.4th 901, 910, 86 Cal.Rptr.3d 876, 882 (Cal.App. 2008) ("it is noteworthy that Congress has not chosen to dispute this viewpoint [that private claims to enforce CCRAA § 1785.25(a) are preempted]. In 2003, one year after the U.S. District Court rendered its reported decision in *[Lin]*, Congress made substantial modifications to FCRA. Had it felt *Lin* to be wrongly decided and intended California to maintain the right to bring private consumer actions, a simple amendment would have so provided.")

[30] *See, e.g., Ivet v. Celico Partnership*, 480 F.Supp.2d 422, 433 (D. Mass. 2007), *reconsideration denied*, 2007 U.S. Dist. LEXIS 82869 (D. Mass. 2007); *accord, Islam v. Option One Mort. Corp.*, 432 F.Supp.2d 181, 189 (D. Mass. 2006); *Gibbs v. SLM*

(Continued on following page)

III. THE FCRA PROHIBITS PRIVATE CAUSES OF ACTION UNDER FCRA § 1681s-2(b) FOR A FURNISHER'S ALLEGED FAILURE TO CORRECT INACCURATE OR INCOMPLETE INFORMATION.

The Ninth Circuit incorrectly holds that a consumer may sue a furnisher under FCRA § 1681s-2(b) for allegedly furnishing inaccurate or incomplete information to a CRA when: (i) the consumer has previously disputed furnished information directly to the furnisher; (ii) the furnisher did not include the notice of dispute when it initially furnished the consumer's information to a CRA; and (iii) the furnisher does not correct the omission following a consumer dispute received through a CRA.[8] Because the Ninth Circuit's decision discovers a private right of action against furnishers *under the FCRA* for the furnishing of inaccurate or incomplete information where none exists, the decision will lead to the filing of similar claims in every state.

The FCRA specifically prohibits any private lawsuit: (i) to recover for a furnisher's failure to include a notice of the consumer's direct dispute in the information furnished to a CRA; or (ii) to recover for a furnisher's failure to correct information previously furnished to a CRA to include the notice of

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Corp., 336 F.Supp.2d 1, 13 (D. Mass. 2004); *Daire v. Capital One Bank*, 2007 U.S. Dist. LEXIS 82870 *4-5 (D. Mass. 2007).

[8] *Gorman*, 584 F.3d 1163-64.

dispute after determining that the furnished information is incomplete or inaccurate.[37]

Although the Ninth Circuit concedes that a consumer has no private right of action against a furnisher for the failure to include a notice of the consumer's direct dispute in the information furnished to a CRA, the Ninth Circuit incorrectly limits that reasoning to the information *initially* furnished to the CRA.[38] Thereafter, despite the language of FCRA §§ 1681s-2(c)(1)&(d) – referring to § 1681s-2(a), the Ninth Circuit holds that a consumer *has* a private right of action under § 1681s-2(b) for the furnisher's failure to correct *previously* furnished inaccurate information.[39] The Ninth Circuit finds this claim in the furnisher's FCRA § 1681s-2(b) duty to investigate a consumer dispute received through a CRA and to report the results of that investigation to the CRA.[40]

According to the Ninth Circuit:

> [A] furnisher does not report "incomplete or inaccurate" information within the meaning of *§ 1681s-2(b)* simply by failing to report a *meritless* dispute, because reporting an actual debt without noting that it is disputed is unlikely to be materially misleading. It is the *failure to report a bona*

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[37] 15 U.S.C. §§ 1681s-2(c)(1)&(d)

[38] *Gorman*, 584 F.3d 1163-64

[39] *Id.*

[40] *Id.* at 1163

> *fide dispute . . . that gives rise to a furnisher's liability* under § *1681s-2(b)*.[4]

The Ninth Circuit, in effect, holds the furnisher to a standard found nowhere in the FCRA. According to the Ninth Circuit, the furnisher who receives a dispute through a CRA must determine whether the dispute is meritorious or bona fide. If the dispute is meritorious or bona fide, the furnisher must correct the information furnished to the CRA or be liable *to the consumer in a private cause of action* brought under FCRA § 1681s-2(b) for the alleged failure to "report the results of the investigation." If, however, the furnisher determines that the dispute is meritless, the Ninth Circuit concludes that the furnisher is not liable to the consumer.[5]

The Ninth Circuit's decision holds the furnisher liable to the consumer under FCRA § 1681s-2(b) if the furnisher's investigation, following a notice of dispute, *inaccurately* determines that the dispute is meritless or not bona fide. No such private cause of action is permitted under section 1681s-2(b). Moreover, the form Notice to Furnishers of Information prepared by the FTC pursuant to § 1681e(d)(2)[6] makes clear that the furnisher's duty under FCRA § 1681s-2(a)(2) to correct or supplement *previously furnished information* applies *any time* a furnisher determines that

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[4] *Id.* (emphasis added).

[5] *Id.* at 1163.

[6] 15 U.S.C. § 1681e(d)(2).

such information is inaccurate or incomplete.[44] Such a determination may come from the furnisher's independent review of its previously furnished information, or in response to a consumer's direct dispute to the furnisher *or a dispute received through a CRA*. Regardless of the cause of the furnisher's determination that previously furnished information is inaccurate or incomplete, the furnisher's duty to correct the information is found only in FCRA § 1681s-2(a)(2). The FCRA makes clear that consumers have no private right of action to enforce any part of subsection 1681s-2(a).[45] The Ninth Circuit may not read FCRA § 1681s-2(b) to create a private right of action that the FCRA expressly prohibits.

Left unreviewed, the Ninth Circuit's decision will give rise to lawsuits in every jurisdiction that will discourage furnishers from continuing to voluntarily furnish consumer transaction information to CRAs. Consumer reports will, as a consequence, become less complete, less accurate and less predictive of a consumer's potential risk. This, in turn, will harm consumers by undermining the efficiency of the consumer reporting system and increasing the costs of those creditors, insurers, landlords, employers and other businesses who rely on consumer reports for their decision-making. The result will be increased delays and transaction costs that will be passed on to

[44] 16 C.F.R. Pt. 698, App. G, Notice of Furnisher Responsibilities.

[45] 15 U.S.C. §§ 1681s-2(c) & (d).

consumers. The Ninth Circuit's decision must be reviewed to avoid such consequences.

CONCLUSION

For the reasons set forth above, FIA's petition for writ of *certiorari* should be granted.

Respectfully submitted,

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